

# Abolition of the Ohio Death Penalty?—Not for Lack of Trying

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Nationally, the death penalty is dwindling. Twenty-nine states now have the death penalty,<sup>1</sup> down from thirty-eight states twelve years ago.<sup>2</sup> Of those twenty-nine, four states have declared a moratorium on executions,<sup>3</sup> including California,

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For decades, Professor Koosed has also served on the Ohio State Bar Association Criminal Justice Committee and occasionally chaired or co-chaired its subcommittee on the death penalty. She was a contributor to a death penalty report produced by said Committee, which called for a cessation of executions until specified reforms could be made. The Committee's death penalty report was approved and adopted by the Council of Delegates in 1997, as described and updated in S. Adele Shank's article "*The Death Penalty in Ohio: Fairness, Justice, and Reliability at Risk*", 63 Ohio St. L. J. 371 (2002).

More recently, Professor Koosed served as a Member of the American Bar Association Individual Rights and Responsibilities Section's Death Penalty Moratorium Implementation Project's "Ohio Assessment Team," which studied Ohio's death penalty practices between 2004 and 2007 and released its report "*Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report, An Analysis of Ohio's Death Penalty Laws Procedures, and Practices*" in September 2007 (available at [www.abanet.org](http://www.abanet.org)). She has also served as an informal resource person and attended meetings of the Ohio Supreme Court and Ohio State Bar Association's Joint Task Force on Administration of the Death Penalty from 2011–2014. Its report "*Joint Task Force to Review the Administration of Ohio's Death Penalty: Final Report & Recommendations*" was released in April 2014.

<sup>1</sup> *Death Penalty Fact Sheet*, DEATH PENALTY INFO. CTR. (last visited apr. 8, 2019), <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

<sup>2</sup> *States with and without the death penalty-2019*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 18, 2019). The nine states recently abolishing are Connecticut, Delaware, Illinois, Maryland, Washington, New Jersey, New Mexico, New York and New Hampshire.

<sup>3</sup> *Id.* (States that recently declared a moratorium on executions: California, Colorado, Pennsylvania, and Oregon).

Despite a recent legislative death penalty study that recommended many reforms, the Pennsylvania Supreme Court has rejected a challenge to the constitutionality of the state's death

which has the country's largest death row by far.<sup>4</sup> A third of the death penalty states have not executed anyone in the last decade.<sup>5</sup>

Ohio, however, has been an outlier to this trend; the Death Penalty Information Center reports that Ohio has judicially executed nearly 500 persons (438 before 1976 and 56 since), and ranks in the top third of states in numbers of executions.<sup>6</sup>

With former Ohio Attorney General, now Governor, Mike DeWine's recent decision to desist from executing until federal courts no longer deem Ohio's method of execution cruel and unusual punishment,<sup>7</sup> perhaps Ohio can be categorized right now as being in an informal moratorium.<sup>8</sup> Though there are still nearly 140

penalty, stating that the Court will consider issues on an as applied basis. *See* Julia Shaw, *Pa. Supreme Court rejects petition to find death penalty unconstitutional*, THE PHILADELPHIA INQUIRER (Sept. 27, 2019) <https://www.inquirer.com/news/pennsylvania-death-penalty-supreme-court-ruling-philadelphia-district-attorney-larry-krasner-20190927.html>.

*See* Mike Cronin, *Death penalty repeal passes NH House with veto-proof majority*, WMUR (Mar. 7, 2019), <https://www.wmur.com/article/death-penalty-repeal-bill-passes-nh-house-with-veto-proof-majority/26750445>.

In Colorado, a repeal bill is before the state legislature. The Governor supports abolition and his party has majorities in both the state senate and house. *See* Jesse Paul, *Colorado lawmakers will consider whether to repeal the death penalty again, as factors align for passage*, COLORADO SUN (Mar. 3, 2019), <https://coloradosun.com/2019/03/03/colorado-death-penalty-repeal-effort/>

<sup>4</sup> On March 13, 2019, Governor Gavin Newsome issued an executive order, reprieving from execution all of California's 737 death-sentenced inmates. Cal. Exec. Order No. N-09-19 (2019); *see also*, Scott Wilson & Mark Berman, *California Gov. Gavin Newsom to impose moratorium on death penalty*, WASH. POST (Mar. 12, 2019), [https://www.washingtonpost.com/national/california-gov-gavin-newsom-to-impose-moratorium-on-death-penalty/2019/03/12/3a3ad1dc-4520-11e9-8aab-95b8d80a1e4f\\_story.html?utm\\_term=.7bdc9a4bf1de](https://www.washingtonpost.com/national/california-gov-gavin-newsom-to-impose-moratorium-on-death-penalty/2019/03/12/3a3ad1dc-4520-11e9-8aab-95b8d80a1e4f_story.html?utm_term=.7bdc9a4bf1de).

California's 730 plus on death row is more than double that of the next most populous row (Florida has 353). *Death Penalty Fact Sheet*, *supra* note 1.

<sup>5</sup> John Gramlich, *California is one of 11 states that have the death penalty but haven't used it in more than a decade*, PEW RESEARCH CTR. (Mar. 14, 2019), <http://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/>.

<sup>6</sup> *State by State Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Apr. 10, 2019); *Death Penalty Fact Sheet*, *supra* note 1.

<sup>7</sup> *See* Laura A. Bischoff, *Ohio Gov. Mike DeWine stops executions, wants new protocol*, DAYTON DAILY NEWS (Feb. 9, 2019), <https://www.daytondailynews.com/news/state--regional-govt--politics/ohio-gov-mike-dewine-stops-executions-wants-new-protocol/1CvQOUD9itSaRYz1FiTBsN/> (quoting the Governor, as he ordered a reprieve: "Ohio is not going to execute someone under my watch when a federal judge has found it to be cruel and unusual punishment." The Governor was also quoted stating: "I don't want to predict dates, but we have to have the protocol, then it will be challenged, then we have a judge make a decision. So, we have to [go] through all that process before we could certainly move down the path toward an execution"). A month earlier, federal district Judge Michael Merz concluded that Ohio's method may cause the inmate "severe pain and needless suffering," yet followed *Glossip v. Gross* by allowing the execution to go forward on the basis that inmate Warren Hennes had not demonstrated a feasible execution alternative existed. *See* *State v. Henness*, 154 Ohio St. 3d 1473 (2019) (citing *Glossip v. Gross*, 135 S. Ct. 2726 (2015)).

<sup>8</sup> *See* Jeremy Pelzer, *Gov. Mike DeWine delays three more executions as review of death drugs continues*, CLEVELAND.COM (Mar. 7, 2019), <https://www.cleveland.com/politics/2019/03/gov-mike-dewine-delays-three-more-executions-as-search-for-new-death-drugs-continues.html> (On March 7,

individuals on Ohio's death row, and execution dates are set for over twenty death row inmates,<sup>9</sup> this informal moratorium offers an opportunity to re-think the death penalty, and at the very least make needed reforms, or perhaps accomplish abolition itself. Moratoria beckon us to the next plateau on our gradual evolution away from death.

This Symposium addresses abolition, and asks the question: why has Ohio not yet joined the abolitionist states when its system is at least equally flawed and costly? There probably is no clear answer as to why the abolition stars have not yet aligned in Ohio, but it is not for lack of trying. This article recounts reform and abolitionist efforts in Ohio to provide a context for conducting that analysis. Part I of the article provides a brief history of the death penalty and abolition efforts in Ohio. Part II summarizes the three official reviews of Ohio's death penalty system that have taken place over the past twenty years. Part III examines some of the key recommendations of the latest review: the 2014 Ohio Supreme Court and Ohio State Bar Association Joint Task Force.

## I. A BRIEF HISTORY OF OHIO'S DEATH PENALTY

Ohio has steadily evolved to move away from death as a penalty. Its history amply supports this observation. Unfortunately, we are still stuck at a very troubling point on that path to outright abolition.

### A. *From Pre-Statehood to 1963*

Ohio's first death penalty enactment came in the Northwest Ordinance of 1787, which punished by "the pains of death" all malice murder and felony-murder

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2019, the Governor delayed three more executions, stating in a press release it was "highly unlikely" the protocol and legal review could occur by May, July, or August when the executions had been scheduled, and he was "mindful of the emotional trauma experienced by victims' families, prosecutors, law enforcement, and DRC employees when an execution is prepared for and then rescheduled." The DRC prison director stated the week before that the agency will not rush the development of a new protocol and "the department will take the time that we need to do a good job." It is very possible executions scheduled in the fall 2019 will also be delayed.).

<sup>9</sup> *May 2019 Fact Sheet*, OHIO DEP'T REHAB. & CORR. (2019), <https://www.drc.ohio.gov/Portals/0/2019%20may%20fact%20sheet.pdf> (listing 138 people on death row); *see also*, *Executions Scheduled for 2019–2023*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/upcoming-executions#year2019> (last visited Oct. 28, 2019) (dozens have execution dates).

killings, and was retained in 1804 after statehood.<sup>10</sup> The first recorded execution with judicial process was the hanging of James Mays on November 15, 1792.<sup>11</sup>

Ohio's first partial narrowing of the death penalty occurred in 1815, when common law murder was abrogated by statute and replaced by the 'Pennsylvania Formula' providing for degrees of murder.<sup>12</sup> Only first degree murderers were death-eligible, and the death penalty was mandatory when one "purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating, or attempting to perpetrate, any rape, arson, robbery, or burglary, kill[ed] another."<sup>13</sup>

The 1800s saw many legislative debates and committee reports addressing abolition. Indeed, in the 1840s Ohio was one of the six most active states in terms of abolition efforts, and is the only state of those six actively executing in recent times.<sup>14</sup> In 1835, the legislature created a small committee to review the death penalty and recommended abolition; a full debate ensued, but the measure was tabled.<sup>15</sup> A few years later, the Governor urged abolition, but in 1844 another proposal was tabled.<sup>16</sup> During the late 1840s, an abolitionist effort was launched in the Statehouse, extensively debated, including in the Constitutional Convention of 1850, but failed by a vote of 50 to 34.<sup>17</sup> In the debates and reports, abolitionists urged that the death penalty prevented reformation, was beyond the state's power, was barbaric, and that jurors might be acquitting guilty persons to avoid execution, leaving the community endangered.<sup>18</sup> Whereas, supporters of the death penalty urged that it was a deterrent and biblically approved.<sup>19</sup>

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<sup>10</sup> 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY, ADOPTED OR ENACTED FROM 1788 TO 1833 INCLUSIVE: TOGETHER WITH THE ORDINANCE OF 1787; THE CONSTITUTIONS OF OHIO AND OF THE UNITED STATES, AND VARIOUS PUBLIC INSTRUMENTS AND ACTS OF CONGRESS 98 (Salmon P. Chase ed., Corey & Fairbank, Cincinnati, 1833).

<sup>11</sup> ANDREW WELSH-HUGGINS, NO WINNERS HERE TONIGHT: RACE, POLITICS, AND GEOGRAPHY IN ONE OF THE COUNTRY'S BUSIEST DEATH PENALTY STATES 12–13 (Ohio University Press 2009).

<sup>12</sup> *Id.*

<sup>13</sup> THE REVISED STATUTES OF THE STATE OF OHIO 1676 (Florien Giauque ed., 1896).

<sup>14</sup> HUGO A. BEDAU, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 7 (Oxford University Press 1997). The other states were Massachusetts, New Jersey, New York, Pennsylvania and Rhode Island. Pennsylvania is currently a moratorium state and has had no executions since 1999. See *Pennsylvania—History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/pennsylvania-1> (last visited Oct. 28, 2019); *Death Penalty Fact Sheet*, *supra* note 1 (others are non-death penalty states).

<sup>15</sup> WELSH-HUGGINS, *supra* note 11, at 18.

<sup>16</sup> *Id.*

<sup>17</sup> WELSH-HUGGINS, *supra* note 11, at 19; Eugene G. Wanger, *Capital Punishment in Ohio: A Brief History*, 16 OHIO LAW. 8 (2002).

<sup>18</sup> WELSH-HUGGINS, *supra* note 11, at 19.

<sup>19</sup> *Id.*

In 1854, an abolitionist bill (SB 21) was introduced and a Special Committee on Capital Punishment recommended its passage, but it too failed.<sup>20</sup> The year 1873 yielded a House report urging solitary confinement for one's natural life as a just substitute; it too failed to advance.<sup>21</sup>

The 1800s legislature was, however, responsive to concerns about the time, place, and manner of executions, *i.e.* creating a public spectacle. At the start of the century, executions were conducted in public by hanging in the county wherein the crime was committed, and they were a hugely popular source of community entertainment.<sup>22</sup> Legislation in 1844 required that the hangings be behind the jail walls, though the community at times still gathered to watch the proceedings in the ensuing years.<sup>23</sup> In 1885, a statute required all executions be carried out at the Ohio penitentiary at midnight, an apparent effort to avert this unseemly public entertainment, with its tendency to encourage mob-like behavior,<sup>24</sup> and to reduce the instances of horrific botched hangings (decapitation, or slow strangulation) arising, in part, due to the use of amateur hangmen.<sup>25</sup>

It is estimated that approximately 120 persons (including juveniles and women) were executed by hanging in the counties,<sup>26</sup> and 28 in the Ohio Pen,<sup>27</sup> sometimes still horrifically.<sup>28</sup>

Sensitive to the gruesomeness of hanging, in 1897 the Ohio legislature required that executions take place by electrocution, at night and in private at the Ohio Pen.<sup>29</sup> An orphan "boy-murderer" was the chair's first victim.<sup>30</sup> Ohio was the second state to use this new method,<sup>31</sup> which was at the time believed to be "quick, noiseless and painless" with "seldom if ever . . . a sight witnessed bordering on the gruesome, as

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<sup>20</sup> SPEC. COMM. ON CAPITAL PUNISHMENT, 51ST GEN. ASSEMB., REP. ON CAPITAL PUNISHMENT 30–36 (Comm. Print Mar. 4, 1854) (urging death is not a deterrent); *see* WELSH-HUGGINS, *supra* note 11, at 20 (minority report urges both individuals and the government have the right to self-defense).

<sup>21</sup> WELSH-HUGGINS, *supra* note 11, at 20.

<sup>22</sup> Wanger, *supra* note 17, at 8; WELSH-HUGGINS, *supra* note 11, at 9–10, 13–16.

<sup>23</sup> Wanger, *supra* note 17, at 8; WELSH-HUGGINS, *supra* note 11, at 14; *see also*, *Life for Life, Justice Finds One More Victim*, CANTON DAILY REPOSITORY (July 20, 1883).

<sup>24</sup> Wanger, *supra* note 17, at 8; BEDAU, *supra* note 14, at 5.

<sup>25</sup> WELSH-HUGGINS, *supra* note 11, at 15–17.

<sup>26</sup> VICTOR L. STREIB, *THE FAIRER DEATH: EXECUTING WOMEN IN OHIO* 28 (Ohio University Press 2006).

<sup>27</sup> State of Ohio Info. on Executions, C. E. Humphreys, Superintendent, Allen Corr. Inst. 1 (Sep. 1988) (on file at the Orient Correctional Institution).

<sup>28</sup> Wanger, *supra* note 17, at 11.

<sup>29</sup> *Id.*

<sup>30</sup> H.M. FOGLE, *THE PALACE OF DEATH OR THE OHIO PENITENTIARY ANNEX* 136–38 (H.M. Fogle ed., 1908) (mistaking the intentions of his employer's lovely wife, William Haas, "a mere boy," raped and then in a panic murdered her); Humphreys, *supra* note 27, at 1 (list) (Haas was 17).

<sup>31</sup> Wanger, *supra* note 17, at 11.

was the case when the old system [of hanging] was in vogue.”<sup>32</sup> These claims are not borne out by experience in Ohio, where at least two executions required multiple applications of electric current,<sup>33</sup> or by experience elsewhere—two U.S. Supreme Court justices have described electrocution as a form of torture that rivals burning at the stake.<sup>34</sup>

Though not willing to abolish the death penalty, Ohio legislators in the last years of the 19<sup>th</sup> century were willing to narrow its application. In 1898, amidst populist attitudes, the trial jury was given the discretionary power to choose life imprisonment (“recommend mercy”) for first degree murderers, and its decision was binding on the trial judge.<sup>35</sup> However shortly thereafter, in the early 1900s, legislators expanded the list of death-eligible first degree murder charges to include: murder by means of obstructing or injuring a railroad, murder of a guard or officer by a prisoner, and murder of a prohibition officer.<sup>36</sup>

Abolition efforts continued in earnest in the early 20<sup>th</sup> century. An Ohio Abolition Society, among others, worked to bring the issue to the electorate as a separate ballot measure.<sup>37</sup> The Ohio Constitutional Convention debated abolition and passed Proposal 62, Number 287 on April 17, 1912 by a 69-to-35 vote, giving Ohioans the opportunity to repeal the death penalty.<sup>38</sup> However, the opportunity was rejected by a substantial majority of voters.<sup>39</sup> This was the first and only electoral referendum on abolition of the death penalty in Ohio.

In 1922, abolitionist Ohio Governor Harry Davis urged repeal, noting that only 40 percent of those sentenced to death were actually executed, that disparities were evident, and that the death penalty did not deter.<sup>40</sup> From 1923 to 1961, at least 18

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<sup>32</sup> FOGLE, *supra* note 30, at 135, 143.

<sup>33</sup> Wanger, *supra* note 17, at 11. *See also* Joe Hallett, *Inmate named Justice built, died in Ohio’s electric chair*, TOLEDO BLADE (Nov. 28, 1993) (Electrocution was not as humane as legislators hoped, describing the 1904 execution of Michael Schiller, after receiving two jolts of 53 seconds and 5 minutes, doctors pronounced him dead. As he was being carried out on a stretcher, movement and a heartbeat were detected. Nearly lifeless, he was strapped into the chair a third time and given three powerful jolts that killed him).

<sup>34</sup> *See* Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., and Marshall, J., dissenting from denial of certiorari) (describing earlier and more recent electrocutions as inflicting unnecessary and wanton pain and cruelty causing torture or a lingering death in at least a significant number of cases).

<sup>35</sup> Ohio Gen. Code Ann. § 12400 (W.H. Anderson 1938) (made jury sentencing the norm in Ohio). A 1933 statute provided that a three-judge panel could hear confession in open court and guilty plea cases, and sentence the offender; that dichotomy is still present today. *See* Ohio Rev. Code Ann. § 2929.03 (2018) (provides for jury or three-judge panel decisions).

<sup>36</sup> Ohio Gen. Code Ann. §§ 12401, 12402, 12402–1 (W.J. Tossell 1911).

<sup>37</sup> Wanger, *supra* note 17, at 11.

<sup>38</sup> *Id.*

<sup>39</sup> WELSH-HUGGINS, *supra* note 11, at 21 (the vote was 303, 246 to 258, 706).

<sup>40</sup> *Id.*

more proposals to abolish the death penalty were presented to the legislature.<sup>41</sup> Although one passed the Ohio House by a wide margin in 1949, that bill died in Senate Committee.<sup>42</sup>

Though supporters of capital punishment during this period argued deterrence, studies in Ohio failed to show that imposing death on the convicted had any deterrent effect on crime. A 1961 study by the Ohio Legislative Service Commission examined the previous fifty years and found no evidence that executions have any discernible effect on homicide rates.<sup>43</sup> Meanwhile, abolitionist arguments focused on the system's reliability and fairness. Historian H. M. Fogle documented executions at the Ohio Pen at the turn of the century and recounted the belief that several were likely innocent.<sup>44</sup> Three of those executed were just sixteen at the time of their executions.<sup>45</sup>

Possible arbitrariness was presented, as from 1900 to 1922, when jury sentencing was the practice, only one-in-five defendants convicted of first-degree murder were executed, and some defendants, though convicted of first-degree murder, received a second-degree sentence.<sup>46</sup>

Racial disparities were also concerning. Of the 343 persons executed at the Ohio Pen between 1897 and 1963, 35 percent were minorities—122 African-Americans and one Asian.<sup>47</sup> At the time, African-Americans numbered from 4 percent to 7 percent of the Ohio population.<sup>48</sup> Only four of those executed were women,<sup>49</sup> two white and two black.<sup>50</sup>

The racial disparities did not slow as the century progressed. When the Ohio legislature's bipartisan Legislative Service Commission examined the race of the 60 persons sentenced to death from 1950 to 1959, it reported 37 percent were African-American, and that nearly twice as many whites as blacks had their sentences

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<sup>41</sup> *Id.* at 22.

<sup>42</sup> *Id.*

<sup>43</sup> OHIO LEGISLATIVE SERV. COMM'N, STAFF RESEARCH REPORT NO. 46 (1961); *see also* William C. Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time Series Analysis*, 28 CLEV. ST. L. REV. 51, 68 (1979).

<sup>44</sup> Wanger, *supra* note 17, at 11.

<sup>45</sup> Humphreys, *supra* note 27 at 4.

<sup>46</sup> WELSH-HUGGINS, *supra* note 11, at 153.

<sup>47</sup> Humphreys, *supra* note 27, at 8 (list).

<sup>48</sup> Shadira Pavelcik, *Ohio's African American Origin and History*, <https://blackdemographics.com/states/ohio/> (last visited Apr. 12, 2019) (discussing the periods 1900–1950, and 1970); WELSH-HUGGINS, *supra* note 11, at 75.

<sup>49</sup> WELSH-HUGGINS, *supra* note 11, at 24.

<sup>50</sup> STREIB, *supra* note 26, at 13 (listing 2 white and 1 African-American in the period 1938 to 1954), 35 (describing the first woman executed in Ohio, in 1844, as a black adult).

commuted to life.<sup>51</sup> This disproportionate punishment of African-Americans is a problem that persists today.

Geography also seemed to play a role in the pre-1963 period. Three counties (Franklin, Cuyahoga, and Hamilton) accounted for 162 of Ohio's 438 executions prior to 1963.<sup>52</sup>

In the 1960s, public opinion began to turn against the death penalty and concerns about the constitutionality of the death penalty brought about an informal moratorium on executions.<sup>53</sup>

The last execution by electrocution in Ohio was that of Donald L. Reinbolt on March 15, 1963,<sup>54</sup> though the electric chair was not formally retired until 2001.<sup>55</sup> Reinbolt was the 315<sup>th</sup> person to die in Ohio's electric chair.<sup>56</sup> Tellingly, "Old Sparky's" thirty-eighth victim was the man who built and designed it.<sup>57</sup> Charles Justice, an imprisoned broom-maker, had designed and built the device before his release, then was returned to the Ohio Pen on a murder conviction<sup>58</sup> and executed on October 27, 1911.<sup>59</sup> So much for the argument that the death penalty will deter.<sup>60</sup>

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<sup>51</sup> WELSH-HUGGINS, *supra* note 11, at 75.

<sup>52</sup> Humphreys, *supra* note 27, at 2 (listing the number of executions by county from 1885 to 1963 as: 55 from Cuyahoga, 55 from Franklin, and 45 from Hamilton, for 155 out of a total 343 executions).

<sup>53</sup> WELSH-HUGGINS, *supra* note 11, at 27 (crediting U.S. Supreme Court Associate Justice Arthur Goldberg's dissent, joined by two others, from the denial of certiorari in a death-imposed rape case, *Alabama v. Rudolph*, 375 U.S. 889 (1963), as the start of the Court's addressing the constitutionality of the death penalty). After leaving the Court to become UN Ambassador in 1965, Justice Goldberg taught two six-week Supreme Court Seminars at the University of Akron Law School, in 1984 and 1989. We talked often about the death penalty. His personal commitment to abolishing the death penalty did not waver, and I occasionally met with him in Washington D.C. or Virginia following an annual NAACP Legal Defense Fund Capital Punishment Conference to report on death penalty defense developments. I will always treasure his informal mentorship.

<sup>54</sup> Humphreys, *supra* note 27, at 8 (list).

<sup>55</sup> OHIO REV. CODE § 2949.22 (West 2019).

<sup>56</sup> Humphreys, *supra* note 27, at 8 (list).

<sup>57</sup> *Id.* at 2.

<sup>58</sup> Andrew Welsh-Huggins, *Ohio's electric chair ban ends use of once 'humane' technique*, DAILY LEGAL NEWS & CLEV. RECORDER, Nov. 27, 2001, at 1.

<sup>59</sup> Humphreys, *supra* note 27, at 2 (list).

<sup>60</sup> See, *DETERRENCE: National Research Council Concludes Deterrence Studies Should Not Influence Death Penalty Policy*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/deterrence-national-research-council-concludes-deterrence-studies-should-not-influence-death-penalty> (last visited Apr. 12, 2019) (a 2012 report of the National Research Council evaluated studies of the deterrent effect and found flaws in the few that tried to demonstrate deterrence.). See also *Glossip v. Gross*, 135 S. Ct. 2726, 2767–2769 (2015) (Breyer, J., dissenting) (no study in the last thirty years has found deterrent benefits of the death penalty, and it does not seem likely the penalty has a significant deterrent effect).



## B. 1963 to 1981

Ohio was not alone in ceasing executions in the early 1960s; nationwide there were no executions from 1968 to 1976, due to a judicial moratorium while the constitutionality of the death penalty was litigated.<sup>61</sup> In 1972, the Supreme Court's *Furman v. Georgia* decision struck down all of the death-sentencing statutes as a violation of the Eighth and Fourteenth Amendments.<sup>62</sup> In five separate concurring opinions, covering 119 pages, the Court found that the penalty was being arbitrarily and capriciously imposed as a consequence of the unguided discretion accorded to juries.<sup>63</sup> Over 550 death-sentenced prisoners around the country (55% of whom were African-American) had their sentences reduced to life imprisonment, and most were eventually released (life imprisonment without parole was generally not available at the time).<sup>64</sup> A later study of those 550-plus prisoners found that if their executions had gone forward, seven homicides (all but one committed in prison) may have been prevented, but four innocent persons would have been wrongfully executed.<sup>65</sup>

Ohio had the second largest death row in the country when *Furman* was decided.<sup>66</sup> Abolition efforts had persisted in Ohio right up to the Court's decision. Just a few months before *Furman*, the Ohio House held two full days of debate on abolition of the death penalty, but once again the measure was tabled.<sup>67</sup> In the midst of comprehensive criminal code reform that largely patterned the Model Penal Code ("MPC"), the bill that passed the Ohio House before *Furman* followed the MPC's method of providing the sentencing jury with guided discretion to consider aggravating and mitigating factors.<sup>68</sup>

But in the wake of *Furman* and its varying opinions critiquing standardless jury discretion in sentencing, the Ohio Legislature decided to remove the jury from the

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<sup>61</sup> BEDAU, *supra* note 14, at 13.

<sup>62</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (two justices found the death penalty *per se* unconstitutional); *id.* at 305–06 (Brennan, J., concurring); *id.* at 370–71 (Marshall, J., concurring). Three justices found that discretionary sentencing, unguided by legislatively defined standards, was unconstitutional. *See id.* at 257 (Douglas, J., concurring), at 310 (Stewart, J., concurring), and at 313 (White, J. concurring).

<sup>63</sup> *Id.* at 240–65.

<sup>64</sup> James W. Marquart & Jonathan R. Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 14 (1989).

<sup>65</sup> *Id.* at 25; BEDAU, *supra* note 14, at 173 (ninety-eight percent did not kill anyone following their commutation).

<sup>66</sup> BEDAU, *supra* note 14, at 164 (Ohio had 59–63 death row inmates at the time of *Furman*).

<sup>67</sup> WELSH-HUGGINS, *supra* at 11, at 28–29.

<sup>68</sup> WELSH-HUGGINS, *supra* at 11, at 30–31; *see also* MODEL PENAL CODE § 210.6 (AM. LAW INST., Official Draft 1962).

sentencing process.<sup>69</sup> Once the jury found one or more statutory aggravating factors in the trial phase, the trial judge would decide on the sentence, with death being mandated unless one-of-three narrowly described mitigating factors was present.<sup>70</sup> This new quasi-mandatory death penalty law went into effect on January 1, 1974.<sup>71</sup>

In response to *Furman*, some states created mandatory schemes, while some others went the route of guided discretion. In 1976, the U.S. Supreme Court heard five cases addressing five of these legislative responses. In *Gregg v. Georgia*,<sup>72</sup> the Court (5-4) upheld the guided discretion scheme in Georgia that included four features: a bifurcated process where guilt and sentencing were considered in separate proceedings, a requirement of proof of statutory aggravating circumstances that narrowed the class of eligible murderers, allowance for consideration of mitigating circumstances calling for a sentence less than death, and a requirement of state appellate review that would be directed at assuring against arbitrary and capricious or discriminatory death-sentencing.<sup>73</sup>

The sentencing schemes of Florida and Texas appeared to roughly approximate these requirements, and were upheld in *Proffitt v. Florida*<sup>74</sup> and *Jurek v. Texas*.<sup>75</sup> However, the mandatory death sentencing schemes established by North Carolina and Louisiana were struck down in 1976 because they undermined reliability (jurors were sometimes refusing to convict when the death sentence was automatic), and because mandatory sentencing was not individualized—it failed to permit consideration of the character and record of the individual offender and the circumstances of the particular offense.<sup>76</sup>

Ohio's 1974 era death penalty legislation fell between these directives. Like Georgia, it had provided for proof of aggravating circumstances and a two-stage appellate review.<sup>77</sup> But the 1974 Ohio legislation was quasi-mandatory—it required a death sentence unless the sentencing judge found, by a preponderance of the evidence, that one of the following circumstances existed: (1) the victim had induced

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<sup>69</sup> Jeffrey T. Heintz, *Legislative Response to Furman v. Georgia*, 46 MASS. BODY OF LIBERTIES 149, 155–56 (1974).

<sup>70</sup> *Lockett v. Ohio*, 438 U.S. 586, 593–94 (1978) (referencing OHIO REV. CODE ANN. §§ 2929.03–2929.04).

<sup>71</sup> Harry J. Lehman & Alan E. Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 23 (1974), available at: <https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss1/33>.

<sup>72</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>73</sup> *Id.* at 205–07.

<sup>74</sup> *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976).

<sup>75</sup> *Jurek v. Texas*, 428 U.S. 262, 276–77 (1976).

<sup>76</sup> *Woodson v. North Carolina*, 428 U.S. 280, 293, 304 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 335–36 (1976) (both of these cases, in addition to *Jurek*, were argued by Professor Tony Amsterdam, who had earlier argued the *Furman* case, and would later argue the *Lockett* case.).

<sup>77</sup> *Lockett v. Ohio*, 438 U.S. 586, 589 (1978) (the appendix to the decision reprints the aggravating circumstances that OHIO REV. CODE ANN. §§ 2929.03–2929.04 set out.)

or facilitated the offense; (2) it was unlikely the offender would have committed the offense but-for the fact the offender was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency.<sup>78</sup> And though, like Texas and Florida, it provided for consideration of some possible mitigating circumstances, under which a penalty less than death could be imposed, this was a very limited list.

In 1977, the Supreme Court granted review to two Ohio cases involving the 1974 Ohio legislation. A year later, in *Lockett v. Ohio* and the companion case of *Bell v. Ohio*, the Court struck down the statute by a vote of six to two.<sup>79</sup>

Ohio's 1974 system failed constitutional muster under the Eighth and Fourteenth Amendments because the decisionmaker was precluded from considering other relevant mitigating factors, including a defendant's character, prior record or absence thereof, age, lack of specific intent to cause death, and relatively minor part in the crime.<sup>80</sup> The Ohio statute offended the principle of individualized sentencing, and the 100 persons who had been sentenced to death in Ohio between 1974 and 1978 received sentences of life imprisonment. Two-thirds of them were minorities.<sup>81</sup>

Not only did the *Lockett* decision save 100 Ohio death row inmates, it is also one of the most significant death penalty decisions from the Court<sup>82</sup> (even though in some respects its rendering was a fortuitous accident; if the Ohio legislature had kept to its original guided discretion bill, or perhaps if the quasi-mandatory statute had reached the Court in 1976, there may have been many more executions in Ohio and around the country).<sup>83</sup> Over the following decade, and after 16 executions had raised the issue, Florida's 1976-approved system of limiting the sentencer to statutory mitigating factors was unanimously found to violate the *Lockett* line of cases.<sup>84</sup>

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<sup>78</sup> *Lockett v. Ohio*, 438 U.S. 586, 593–94 (1978) (referencing then OHIO REV. CODE ANN. §§ 2929.03-2929.04).

<sup>79</sup> *Lockett*, 438 U.S. at 608–09; *Bell v. Ohio*, 438 U.S. 637, 643 (1978).

<sup>80</sup> See *Lockett*, 438 U.S. at 590, 597 (Sandra Lockett's case presented all of these potential mitigators); *Bell*, 438 U.S. at 639 (Bell was just fifteen at the time of his crime).

<sup>81</sup> WELSH-HUGGINS, *supra* note 11, at 42.

<sup>82</sup> See Margery M. Koosed, *Introduction to the "Lockett v. Ohio at 40 Symposium": Rethinking the Death Penalty 40 Years After the U.S. Supreme Court Decision*, 10 CONLAWNOW 1 (2018).

<sup>83</sup> The two-year period between *Jurek*, *Proffitt*, and the Court's decision in *Lockett* may have been critical. The delay was brought about by Ohio, and not the two other states, as Ohio provided for review in the courts of appeal before a death case could proceed to the Ohio Supreme Court. Sandra Lockett's co-counsel Joel Berger (of the NAACP Legal Defense Fund) later opined to the author that had Lockett's case reached the U.S. Supreme Court in 1976 at the same time as *Jurek*, the similarities between the Ohio and Texas schemes might have led the Court to find Ohio's scheme fell into the "*Jurek* sinkhole," which might have led the Court to affirm Lockett's death sentence. Instead, the *Lockett* decision's requirement that the sentencing jury be able to consider and give effect to all relevant mitigating evidence prevailed.

<sup>84</sup> *Hitchcock v. Dugger*, 481 U.S. 393 (1987); see DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* 300–01 (University of Michigan Press 2006).

Similarly, Texas' 1976-approved system also fell in most respects to *Lockett's* mandate,<sup>85</sup> leading to a new, more life-oriented statute in the country's most active execution state.<sup>86</sup>

Post-*Lockett*, the Ohio legislature plunged once again into extensive abolition debates. It would take three years to resolve whether Ohio would abolish the death penalty.<sup>87</sup> Committee votes in the House and Senate to replace death with life imprisonment without parole failed by just one vote in February 1979 and January 1981.<sup>88</sup> The record-setting long debates again referenced deterrence, victims and retribution, arbitrary and uneven enforcement on the poor and minorities, religious and moral concerns, barbarity, costs if the statute was once again overturned, costs of the necessarily lengthy appeals process, costs compared to life without parole, and the relative toughness on crime of life without parole.<sup>89</sup>

Abolitionists Larry Herman, Benson Wolman, Rosina Maynard, along with state public defender Randy Dana and many others, including this author, did our best, but eventually it became evident that Ohio would re-enact the death penalty. Our efforts then shifted to writing the narrowest and most defendant-friendly legislation we could, which, at the same time, we urged, was more likely to pass constitutional muster. Legislators, not wanting to write yet another unconstitutional statute, largely agreed, and some helpful reforms ensued.

Our present Ohio death penalty statute was 1981's Senate Bill 1. It re-enacted the death penalty effective October 19, 1981.

### C. *The 1981 Statute, Amendments Thereto, and Lethal Injection*

#### 1. The 1981 Statute

The 1981 enactment encompassed some helpful reforms. To be eligible for death, one has to: be eighteen at the time of the crime;<sup>90</sup> purposely and with prior calculation and design, or purposely while in the course of a specified felony, cause the death of another;<sup>91</sup> and, have been charged in the indictment with one or more statutory aggravating circumstances that must be proven beyond a reasonable doubt

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<sup>85</sup> See *Penry v. Lynaugh*, 492 U.S. 302 (1989). But see *Johnson v. Texas*, 509 U.S. 350 (1993).

<sup>86</sup> TEX. CODE CRIM. PROC. art. 37.071 § 2(d–e, g) (life sentence mandated if jurors fail to find death to be a proper punishment after considering all the evidence).

<sup>87</sup> WELSH-HUGGINS, *supra* note 11, at 37, 41.

<sup>88</sup> *Id.*

<sup>89</sup> WELSH-HUGGINS, *supra* note 11, at 37–43.

<sup>90</sup> OHIO REV. CODE ANN. § 2929.023 (2018).

<sup>91</sup> OHIO REV. CODE ANN. §§ 2929.03(A), 2929.04(A), 2941.14(B) (2018).

in the trial phase.<sup>92</sup> In instances where felony aggravated murder is charged as an aggravating circumstance, the principal offender must have purposely caused the death and an accomplice must have acted with prior calculation and design to kill.<sup>93</sup> In assessing the death penalty question, only the statutory aggravating circumstance(s) proven beyond a reasonable doubt may be weighed against mitigating circumstances in the penalty phase<sup>94</sup> and all relevant mitigating circumstances are to be considered.<sup>95</sup> Death will only be imposed where the jury unanimously finds that the statutory aggravating factor(s) outweigh the mitigating circumstances beyond a reasonable doubt.<sup>96</sup> If a life sentence is imposed by a jury (due to a unanimous or hung jury on penalty), it is not subject to override by the trial judge.<sup>97</sup> If a death sentence is recommended by the jury, the judge must do an independent review and determine if the aggravating factors outweigh those in mitigation beyond a reasonable doubt.<sup>98</sup> Trial judges are to complete a sentencing opinion identifying the aggravating and mitigating circumstances in any case that proceeds to a penalty phase, whether it resulted in a life or death sentence.<sup>99</sup> All capital indictments are to be filed with the Ohio Supreme Court and updated with its disposition.<sup>100</sup> Appellate review is to include independent review in the intermediate district courts of appeals and the Ohio Supreme Court, each court being required to review and independently weigh all of the facts and other evidence disclosed in the record and determine whether the aggravating circumstances outweighed the mitigating circumstances, whether the death penalty is appropriate, and whether the death sentence is excessive or disproportionate when compared to other similar cases.<sup>101</sup>

All these provisions were designed to meet constitutional requirements and anticipate those yet to come (several of which did eventually come about).<sup>102</sup> Many

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<sup>92</sup> OHIO REV. CODE ANN. §§ 2929.03(A), 2929.04(A), 2941.14(B) (2018).

<sup>93</sup> OHIO REV. CODE ANN. § 2929.04(A)(7) (2018).

<sup>94</sup> OHIO REV. CODE ANN. § 2903.01 (D); *see* *State v. Wogenstahl*, 75 Ohio St. 3d 344, 356 (1996); *State v. Johnson*, 24 Ohio St. 3d 87 (1986); *State v. Henderson*, 39 Ohio St. 3d 24, 26 (1988).

<sup>95</sup> OHIO REV. CODE ANN. § 2929.04(B) (2018).

<sup>96</sup> OHIO REV. CODE ANN. § 2929.03(D)(1)–(2) (2018).

<sup>97</sup> OHIO REV. CODE ANN. § 2929.03 (D)(2)(c) (2018).

<sup>98</sup> OHIO REV. CODE ANN. § 2929.03(D)(3) (2018).

<sup>99</sup> OHIO REV. CODE ANN. § 2929.03(F) (2018).

<sup>100</sup> OHIO REV. CODE ANN. § 2929.021 (2018).

<sup>101</sup> OHIO REV. CODE ANN. § 2929.05(A) (2018).

<sup>102</sup> *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders ineligible for death); *see also* *Enmund v. Florida*, 458 U.S. 782 (1982) (intent to kill or attempt to kill is requisite mens rea for accomplice death-eligibility); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury findings of aggravating circumstances).

features were indeed model provisions for other states,<sup>103</sup> such as the Ohio Supreme Court's 1980s rule-making action requiring that capital defendants be represented by adequately trained and experienced counsel.<sup>104</sup>

## 2. Later Legislative Amendments—Death Eligibility

Later amendments expanded death eligibility. The legislature added three forms of aggravated murder—purposely (with or without prior calculation and design) causing the death: (1) of a person under 13 years of age; (2) of a person while under or breaking detention; or, (3) of an active duty law enforcement officer with knowledge or reason to know of that status.<sup>105</sup> The 'Victim being under 13 years of age' was also added to the aggravating factor list, so that much like with felony-aggravated murder, the victim's age became a bootstrap into death eligibility for the principal offender with no further facts needing to be shown.<sup>106</sup> 'Causing the death while committing terrorism' was also added as an aggravating factor.<sup>107</sup>

## 3. Later Legislative Amendments—Life Without Parole (Reduces Death Sentences)

Lawmakers in the 1981 legislature refused abolitionist efforts to substitute life without parole for the death penalty, then considered adding it as an option in the 1981 law, but ultimately rejected that too.<sup>108</sup> Eventually, legislative changes to the life-sentencing options were passed—possibly the most consequential alterations to Ohio law—having significantly reduced the actual imposition of death sentences.

The original 1981 statute had provided juries with a choice of death, life with parole eligibility after twenty full years, or life with parole eligibility after thirty full years.<sup>109</sup>

By legislation that became effective on July 1, 1996, life imprisonment without parole ("LWOP") became an option, and life imprisonment with parole eligibility

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<sup>103</sup> See Margery M. Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingered Doubt*, 21 N. ILL. U. L. REV. 41, 104–08 (2001) (in which I wrote about the advantages of Ohio's bifurcation system—including that it provides for due process pre-trial notice, discovery, jury determination, and proof beyond a reasonable doubt of statutory aggravating circumstances in the trial phase).

<sup>104</sup> See Margery M. Koosed, *Trying to Get It Right—Ohio, from the Eighties to the Teens*, 43 HOFSTRA L. REV. 783, 797–803 (2015) (discussing creation of Ohio Rule of Superintendence 65).

<sup>105</sup> OHIO REV. CODE ANN. § 2903.01(C)–(E) (2018).

<sup>106</sup> OHIO REV. CODE ANN. §§ 2929.04(A)(7), (A)(9) (2018) (felony aggravated murder and under age 13, respectively; both require that an accomplice have acted with prior calculation and design to kill).

<sup>107</sup> OHIO REV. CODE ANN. § 2929.04(A)(10) (2018).

<sup>108</sup> WELSH-HUGGINS, *supra* note 11, at 42.

<sup>109</sup> OHIO REV. CODE ANN. § 2929.03(D)(2–3) (2018).

after twenty-five years replaced the twenty years provision.<sup>110</sup> So, for capital crimes committed after July 1, 1996 the options presented to juries are: death, life without parole, life with thirty, or life with twenty-five years before parole eligibility.<sup>111</sup> Furthermore, in addition to providing life without parole as an option in capital cases, the legislature made LWOP a possible sentence in aggravated murder without specifications (aggravating factors) cases.<sup>112</sup>

Adding LWOP to the options in Ohio capital murder and non-capital aggravated murder cases has significantly reduced the number of capital indictments and the number of death sentences imposed.<sup>113</sup> The number of capital indictments has fallen from ninety-seven in 2004<sup>114</sup> to twenty-six in 2015.<sup>115</sup> The availability of the LWOP option also caused the number of those sent to death row to drop significantly; between the years 1983 to 1996 an average of fourteen persons per year were sentenced to death, whereas from 1997 to 2017 only four persons per year received death on average.<sup>116</sup> The actual numbers have continued to drop—whereas in 1996 seventeen death sentences were imposed in 1996 was seventeen,<sup>117</sup> in 2015

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<sup>110</sup> S.B. 2, 121st Gen. Assemb., 1995 Ohio Laws 146 (life without parole); S.B. 269, 121st Gen. Assemb., 1995 Ohio Laws 146 (life with 25).

<sup>111</sup> See Margery M. Koosed, *On Seeking Controlling Law and Re-Seeking Death Under Section 2929.06 of the Ohio Revised Code*, 46 CLE. ST. L. REV. 261, 263–69 (1998) (describing a case where the jury was erroneously deprived of a life without parole option, requiring a new penalty phase proceeding); see also ANDERSON’S OHIO CRIMINAL LAW HANDBOOK (Lexis Nexis 2019) (note: it can sometimes be challenging discerning amendments and the effective dates of Ohio legislation, as the often-used *Ohio Criminal Law Handbook*, though regularly updated, fails to recite what changes were made and when).

<sup>112</sup> OHIO REV. CODE ANN. § 2903.01(F) (2018); sentencing under OHIO REV. CODE ANN. § 2929.02(A) (2018).

<sup>113</sup> WELSH-HUGGINS, *supra* note 11, at 164–67.

<sup>114</sup> *Id.* at 166.

<sup>115</sup> A RELIC OF THE PAST: OHIO’S DWINDLING DEATH PENALTY 21, 23 (Ohioans to Stop Executions 2016) (Cuyahoga County filed no capital indictments in 2015—the argument that having the death penalty on the books is necessary to ensure continued plea bargaining in homicide cases seems to be belied as well; there is no evidence a greater number of murder cases were going to trial in the county that so reduced its capital indictments).

<sup>116</sup> 2017 OHIO ATT’Y GEN. CAPITAL CRIMES ANN. REP. 28–32, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2017-ANNUAL-REPORT-WEB>.

<sup>117</sup> 2012 OHIO ATT’Y GEN. CAPITAL CRIMES ANN. REP. 26, [https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2012-Cap-Crimes-Annual-Report-Final\\_for-web](https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2012-Cap-Crimes-Annual-Report-Final_for-web). See also WELSH-HUGGINS, *supra* note 11, at 166.

there was only one,<sup>118</sup> in 2016 there were four<sup>119</sup>, and in 2017 there was again only one death sentence.<sup>120</sup>

Such turning away from death is consistent with, and exceeds, national figures. In 1999, 279 death sentences were handed down nationally, whereas in 2018, there were just forty-two.<sup>121</sup> Further, a 2010 poll revealed that sixty-one percent of those polled preferred some form of a life sentence over a death sentence.<sup>122</sup>

Given the importance of life without parole in sentencing decision-making, it is very troubling that nearly two-thirds (thirteen) of the inmates presently sitting with execution dates in Ohio were sentenced to death without the decisionmaker having the option to consider life without parole.<sup>123</sup>

The unavailability of LWOP should be a significant factor in clemency decisions for these and other death row inmates. Clemency historically has filled in the gaps in the legal system. “Executive clemency exists to afford relief from undue harshness or evident mistake,”<sup>124</sup> and allows the executive to take into account factors the judge and jury could not act upon due to the limits of the law.<sup>125</sup> “[Ohio] governors have frequently used the power of clemency to make the penalty imposed on the individual offender consistent with the penalty imposed upon other individual offenders.”<sup>126</sup> Comparing the facts of these cases with the facts in more recent cases where LWOP was imposed is essential to doing sentencing equity in Ohio. Thus

<sup>118</sup> 2015 OHIO ATT’Y GEN. CAPITAL CRIMES ANN. REP. 27, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2015-Capital-Crimes-Annual-Report-WEB-FINAL>.

<sup>119</sup> 2016 OHIO ATT’Y GEN. CAPITAL CRIMES ANN. REP. 29, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2016-Capital-Crimes-Annual-Report>.

<sup>120</sup> 2017 OHIO ATT’Y GEN. CAPITAL CRIMES ANN. REP. 28, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2017-ANNUAL-REPORT-WEB>; see also A RELIC OF THE PAST: OHIO’S DWINDLING DEATH PENALTY, *supra* note 115, at 28 (finding that the yield on capital indictments is quite small; in 2014, of 21 capital charged cases, only 3 received death).

<sup>121</sup> *Death Penalty Fact Sheet*, *supra* note 1.

<sup>122</sup> *Id.*

<sup>123</sup> *Upcoming Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/upcoming-executions> (last visited Apr. 8, 2019) (listing execution dates); 2012 OHIO ATT’Y GEN. CAPITAL CRIMES ANN. REP. 53, 61, 72, 108, 130, 162, 170, 177, 194, 209, 218, 294, 304, 340 (2013) (indicating that the following inmates with execution dates committed their crime before July 1, 1996 and therefore did not have LWOP as an available sentence when tried (listed in order of execution date): Jones, Henness, Dixon, Wogenstahl, Hoffner, Lott, Frazier, Landrum, Bonnell, Stumpf, Broom, Sneed, Hutton, and Carter).

<sup>124</sup> *Ex Parte Grossman*, 267 U.S. 87, 120 (1924).

<sup>125</sup> See Margery M. Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio’s Death Sentences*, 19 CAP. U. L. REV. 695, 756–58 (1990).

<sup>126</sup> Michael DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L. J. 73, 84 (1964) (former Governor of Ohio).



far, Ohio governors have commuted twenty death sentences to life imprisonment—doing sentence equity should surely increase that number.<sup>127</sup>

#### 4. Later State Constitutional Amendment—Removing District Court of Appeals Review

Under the 1981 legislation (O.R.C. § 2901.05), as in any criminal case by state constitutional provision Article IV Section 3(B)(2), a capital conviction and death sentence are appealable directly to the Ohio District Court of Appeals. No executions had taken place under the law when, in 1994, Governor George Voinovich and then-candidate for Attorney General and Chair of the Ohio Senate Judiciary Committee, Betty Montgomery, began urging that the review process be sped up.<sup>128</sup> Montgomery wanted executions to take place within a few years of sentencing, despite the fact that at that time, an innocent death row inmate spent on average 8 years on the row prior to his or her exoneration.<sup>129</sup>

Montgomery proposed speeding up executions by eliminating the Court of Appeals review on direct appeal.<sup>130</sup> She conducted hearings at which cameras captured only her supporting witnesses/victim's family members testifying, and during which Montgomery would cross-examine any witness with a contrary view, including the author.

Montgomery ended up winning both the vote to place the amendment of the state constitution on the ballot, as well as the Attorney General position.<sup>131</sup> She succeeded in both ventures despite the risk of executing innocents, and the

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<sup>127</sup> See *Clemency*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency> (last visited Apr. 10, 2019) (Governor Celeste commuted the death sentences of eight inmates in 1991, Governor Taft commuted one, Governor Strickland commuted five, and Governor Kasich commuted seven.). See 2017 OHIO ATT'Y GEN. CAPITAL CRIMES ANN. REP. 24, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2017-ANNUAL-REPORT-WEB> (naming the eight death row inmates whose sentences were commuted by Governor Celeste); Andrew Welsh-Huggins, *Kasich spares record number of death row inmates*, THE ENQUIRER (July 30, 2018), <https://www.cincinnati.com/story/news/politics/2018/07/30/ohio-governor-john-kasich-spare-record-number-death-row-inmates/863740002/> (responding to Governor Celeste granting commutations to 8 death row inmates before leaving office, in 1995 Ohio voters approved an amendment to Article III of the Constitution of the State of Ohio requiring that the Governor follow state regulations respecting the manner of applying for commutations, so all applications come first to the Ohio Parole Board for their recommendation, but the Governor is not bound by any recommendation). See OHIO REV. CODE ANN. §§ 2967.03–2967.08 (West 2019).

<sup>128</sup> WELSH-HUGGINS, *supra* note 11, at 60–61.

<sup>129</sup> Margery Koosed, Submission to the Senate Subcommittee Select Committee on Crime In Opposition to H.J.R. No. 15 Which Would Deny Death-Sentenced Inmates an Appeal to the Court of Appeals 2 (Apr. 7, 1994) (citing STAFF OF SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS OF THE H. COMM. ON THE JUDICIARY, 103D CONG., REPORT ON INNOCENCE & THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS (1993)).

<sup>130</sup> *Id.*

<sup>131</sup> WELSH-HUGGINS, *supra* note 11, at 61–62.

foreseeable consequences of eliminating court of appeals review. The local district court of appeals had borne the burden of completing the case record, reviewing briefs, narrowing the issues/providing guidance for the Ohio Supreme Court's review, and reversing fifteen percent of the cases. Predictably, eliminating the court of appeals review would lessen the Supreme Court's time devoted to capital cases and leave room for discretionary cases on their docket.<sup>132</sup>

The constitutional amendment to remove the court of appeals review, known as Issue 1, passed overwhelmingly on November 8, 1994, even though the State Bar Association, and a good number of judges and prosecutors, among others, opposed the measure.<sup>133</sup> As a consequence, persons sentenced to death after January 1, 1995 only have access to one level of direct appeal review, and that is with the Ohio Supreme Court.

The politics of being tough on crime held the day. A level of scrutiny was lost, and the Ohio Supreme Court became further burdened and limited in its time to devote to discretionary review cases, and for what? No time has been saved. The district courts of appeal receive the appeals from post-conviction petition denials and must review the full record and all the prior legal arguments when deciding whether an error occurred and/or whether the error warrants relief. Whatever time in theory is saved on direct review is expended by the courts of appeal in the post-conviction stage. In addition, the Supreme Court lost the valuable groundwork and prompt input the court of appeals could have given via direct appeal. The local district courts have a home court advantage by way of familiarity with the lawyering emanating from prosecutor and defense offices. They are in a position to assess possible risks of misconduct or incompetence and to recognize and nip unlawful or unconstitutional practices in the bud. Finally, it does not appear the process has actually been sped up—the average time spent on death row until execution in Ohio is still nearly seventeen years.<sup>134</sup>

##### 5. Later Legislative Amendment—New Jury Resentencing to Death Proceedings

In the 1981 legislation, there was no provision for resentencing to death in jury-tried cases when errors in the penalty phase required reversal of the death sentence.<sup>135</sup> The Ohio Supreme Court addressed this gap when it ruled that a

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<sup>132</sup> *Id.*

<sup>133</sup> See James Ewinger, *Shorter Appeals for Death Penalty Cases Argued*, CLEV. PLAIN DEALER, Oct. 11, 1994, at B4 (identifying the Cuyahoga County Prosecutor, judges and others); Associated Press, *Supreme Court Candidates Concur: Shorter Death Penalty Process Won't Work*, CINCINNATI ENQUIRER, Sept. 25, 1994, at B6; Ray Michalski, *Issue 1: Too Little, Too Soon*, OHIO STATE BAR ASS'N (Oct. 1994).

<sup>134</sup> 2017 OHIO ATT'Y GEN. CAPITAL CRIMES ANN. REP. 27, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2017-ANNUAL-REPORT-WEB>.

<sup>135</sup> See OHIO REV. CODE ANN. § 2929.06 (West 2019).

reviewing court finding error in a jury case must order a remand to the trial judge, so the judge could choose one of the life sentences.<sup>136</sup> When the federal Sixth Circuit Court of Appeals reversed the death penalty in the first death penalty case to reach them, a case involving the killing of a police officer, Attorney General Betty Montgomery's tough on crime stance was tarnished, and she campaigned to write a law that would allow retrials of the penalty phase so death could be re-imposed on remand.<sup>137</sup>

Senate Bill 258, effective October 16, 1996, provided for a new sentencing jury to be impaneled to hear the penalty phase in cases where a reversal of penalty occurred.<sup>138</sup> Multiple issues and costs arise in making use of this retrial opportunity. Ohio's bifurcation scheme provides for proving aggravating circumstances in the trial phase, then weighing these against mitigators in the penalty phase. Penalty-phase-only retrials before a new jury raise additional legal challenges and may well waste limited judicial and criminal justice system resources, particularly when lengthy prison sentences (e.g. for other crimes) are already in place or could be imposed in lieu of death.<sup>139</sup> Prosecutors and defense counsel sometimes avoid these problems by engaging in negotiations on remand in these cases and reach life sentence results. Whereas the previous law had encouraged a plea of sorts to the benefit of the prosecution (a defendant who won a reversal of penalty and a life sentence might decide to forego pursuing further attacks on their conviction as reversal of one's conviction could lead to a retrial that could lead to a death sentence again), the present law removes that incentive to desist, yet it allows for such negotiations on remand nonetheless.

#### 6. Changing the Way of Executing—From the Chair to Lethal Injection (and Challenges)

As noted earlier, electrocution was viewed to be a more humane and less gruesome practice than hanging when it was first put into use in 1897, though experiences with the chair demonstrated that it remained a painful and gruesome way to die, possibly similar to being burned at the stake.<sup>140</sup>

In the early 90s, before executions had resumed under the new law, the Ohio Legislature took up H.B. 11, a bill giving defendants the option to choose lethal

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<sup>136</sup> See *State v. Penni*, 513 N.E.2d 744 (Ohio 1987); *State v. Davis*, 528 N.E.2d 925 (Ohio 1988).

<sup>137</sup> Koosed, *supra* note 111, at 271–72.

<sup>138</sup> See OHIO REV. CODE ANN. § 2929.06(A)(2) (West 2019) (stating that this retrial provision does not apply if the reversal of penalty is due to a failure to prove an aggravating circumstance, or to prove that aggravating outweighs mitigating factors, or if there is a finding that the death sentence is excessive).

<sup>139</sup> Koosed, *supra* note 111, at 275–87.

<sup>140</sup> See *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting).

injection,<sup>141</sup> which was first used to execute Charles Brooks in Texas in 1982.<sup>142</sup> The members of the defense bar and abolitionist activists in the Ohio Death Penalty Task Force were torn on H.B. 11. Should we oppose the measure so that Ohioans would have to continue to deal with the horror of what the State was actually doing—an intentional, deliberate killing in a horrific manner of essentially frying someone alive—in order to argue more effectively against the death penalty? Or should we support the option of lethal injection—despite understanding that many Ohioans may look at it as just a peaceful sleep that may perhaps be too kind—to spare our clients the pain and terror of electrocution? In the end, we joined others in supporting the bill, and it passed.<sup>143</sup>

Wilford Berry, a volunteer who had waived his federal appeals, was the first person executed under the 1981 law. He chose lethal injection in 1999, so the electric chair was left empty. In 2001, Ohio banned the electric chair and made lethal injection the sole means of execution.<sup>144</sup>

The Ohio lethal injection statute law requires the execution be a quick and painless death.<sup>145</sup> But is it? Were we truly saving our clients from pain and suffering? Perhaps, or we believe so early on, but it appears no longer.

History repeats itself, for we are coming to understand that lethal injection is not as painless as it once was and/or thought to be. Considering this scientifically technical material in the most simplistic terms: the original three-drug cocktail that brought about the execution of Brooks and the early executions in Ohio began with a strong barbiturate (sodium thiopental or pentobarbital) that anesthetized the inmate so that he would not feel the effects of the later paralytic agent that would stop the heart causing suffocation, and the effects of the last drug (potassium chloride) that may feel like fire in one's veins.<sup>146</sup> In *Baze v. Rees*,<sup>147</sup> the U.S. Supreme Court upheld the constitutionality of this recipe under the Eighth Amendment because there was no evidence that Kentucky's method created a substantial risk of wanton and unnecessary infliction of pain, torture, or a lingering death due to the anesthetic administered.<sup>148</sup>

But those anesthetics are no longer available. Many are patented and produced by companies in the European Union, which bars the death penalty and sales of these

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<sup>141</sup> H.B. 11, 120th Gen. Assemb. (Ohio 1993).

<sup>142</sup> FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS IN AMERICA* 39 (1990).

<sup>143</sup> H.B. 11, 120th Gen. Assemb. (Ohio 1993) (enacted) (current version at OHIO REV. CODE ANN. § 2949.22 (West 2019)).

<sup>144</sup> H.B. 362, 124th Gen. Assemb. (Ohio 2001) (enacted) (current version at OHIO REV. CODE ANN. § 2949.22(A) (West 2019)).

<sup>145</sup> OHIO REV. CODE ANN. § 2949.22(A) (West 2019).

<sup>146</sup> DRIMMER, *supra* note 142, at 108.

<sup>147</sup> *Baze v. Rees*, 553 U.S. 35, 50–52 (2008).

<sup>148</sup> *Id.*

drugs to others who will use them for such purposes.<sup>149</sup> As a result, these and other companies refuse to provide their drugs for execution purposes.<sup>150</sup> So, somewhat in desperation,<sup>151</sup> and after some periods of delays and litigation, Ohio and other states have tried to substitute a sedative, midazolam, in place of the anesthetic.<sup>152</sup>

In 2014, Ohio tried a mixture of the sedative midazolam and hydromorphone, which had never been used before.<sup>153</sup> This experiment was carried out on Dennis McGuire, who pushed himself up from the table, talked to witnesses over a microphone and gestured to others then snorted, all in the twenty minutes it took him to die.<sup>154</sup> Witnesses at a hearing in federal court related the uncertainties of possible consciousness and experiencing of pain involved in such experimentation.<sup>155</sup> Executions were halted until 2017, when Ohio moved back to a three drug cocktail with midazolam instead of an anesthetic because the latter was still unavailable, and only three have occurred since.<sup>156</sup>

U.S. Magistrate Judge Michael Merz (S.D. Ohio) held multiple days of hearings on the use of midazolam followed by the other two drugs. He heard extensive testimony from medical experts and eyewitnesses. On January 14, 2019, in a 148-page opinion, Judge Merz ruled that Ohio's lethal injection protocol "will almost certainly subject [a prisoner] to severe pain and needless suffering," because "it is certain or very likely that a 500 mg IV-injected dose of midazolam cannot reduce consciousness to the level at which a condemned inmate will not experience the severe pain associated with injection of the paralytic drug or potassium chloride."<sup>157</sup> That severe pain would feel "as though fire was being poured" into a prisoner's

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<sup>149</sup> Max Ehrenfreund, *Dennis McGuire Executed in Ohio with New Combination of Drugs*, WASHINGTON POST (Jan. 16, 2014), [https://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723\\_story.html?utm\\_term=.83d9d7b2ece0](https://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723_story.html?utm_term=.83d9d7b2ece0).

<sup>150</sup> *Id.*

<sup>151</sup> In an attempt to obtain the drugs and avoid public pressure being brought to bear on the maker or supplier, the Ohio legislature also enacted a secrecy law forbidding disclosure of their identity. See H.B. 663, 130th Gen. Assemb. (Ohio 2014) (enacted) (codified as amended at OHIO REV. CODE ANN. § 2949.221–.222 (West 2019) (questioning whether the State is using subterfuge to get drugs from manufacturers); see also Marty Schladen, *Is Ohio Using Subterfuge to Obtain Its Execution Drugs?*, COLUMBUS DISPATCH (Mar. 13, 2019), <https://www.dispatch.com/news/20190313/is-ohio-using-subterfuge-to-obtain-its-execution-drugs>.

<sup>152</sup> See WELSH-HUGGINS, *supra* note 11, at 167–69; Andrew Welsh-Huggins, *Federal Judge Rejects Ohio's New Lethal Injection Process*, ASSOCIATED PRESS (Jan. 26, 2017), <https://www.apnews.com/ce9d063add4241c38bb620097f059f98> [hereinafter *Federal Judge*] (noting Ohio had not executed anyone since the 2014 execution of Dennis McGuire).

<sup>153</sup> Ehrenfreund, *supra* note 149.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Federal Judge*, *supra* note 152.

<sup>157</sup> *In Re Ohio Execution Protocol*, No. 2:11-cv-1016, at 131 (S.D. Ohio Jan. 14, 2019).

veins.<sup>158</sup> Judge Merz credited newly developed expert testimony about midazolam's use in executions, including a showing that 24-out-of-28 available autopsies from recent midazolam executions proved that the drug caused pulmonary edema, an extremely painful condition that induces "a sense of drowning and the attendant panic and terror, similar to that which would occur with the torture tactic known as waterboarding."<sup>159</sup>

While this torture "should be enough to constitute cruel and unusual punishment,"<sup>160</sup> Judge Merz was unable to conclude as such. Under *Baze* and the later U.S. Supreme Court case, *Glossip v. Gross*,<sup>161</sup> death row inmate Warren Henness had to also prove that an alternative procedure existed that was "feasible, readily implemented, and [would] in fact, significantly reduce a substantial risk or severe pain" and that the State refused to use it.<sup>162</sup> As Henness failed to make that second showing, Judge Merz could not find an Eighth Amendment violation.<sup>163</sup> But to his credit, Governor Mike DeWine, unwilling to carry out a torturous execution, and willing to wait until a court approved a new protocol, granted a reprieve to Henness and three other inmates.<sup>164</sup>

Ohio has had already seen several botched needle executions. Two were only a year apart. In 2006, after personnel experienced difficulty finding a site to insert Joseph Clark's fatal IV—spending forty minutes locating an alternative vein—Clark pushed himself up on the table four minutes after the drugs began to flow, declared "it don't work," and finally died nine minutes later.<sup>165</sup> In 2007, it took ninety minutes to find a vein in Christopher Newton's arms and it took him twice as long to die, as death was finally declared two hours after the start of the procedure.<sup>166</sup> Two years later, Romell Broom was subjected to two hours and eighteen attempts to find a vein—eighteen jabs, in both arms and both legs—before DRC Director Terry Collins urged Governor Strickland to grant a reprieve, which was granted.<sup>167</sup>

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<sup>158</sup> *Id.* at 54.

<sup>159</sup> *Id.* at 37, 131.

<sup>160</sup> *Id.* at 148.

<sup>161</sup> *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

<sup>162</sup> *Baze v. Rees*, 533 U.S. 35, 52 (2008) (plurality opinion of Roberts, C.J., with Kennedy, J., and Alito, J.) (no opinion garnered more than three votes).

<sup>163</sup> *In re Ohio Execution Protocol*, 235 F. Supp. 3d 892 (S.D. Ohio Jan. 14, 2017) (Judge Merz's opinion pre-dated the recent decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), which involved an unusual set of facts and the administration of an anaesthetic, not midazolam).

<sup>164</sup> See *supra* notes 7–9 and accompanying text.

<sup>165</sup> WELSH-HUGGINS, *supra* note 11, at 146–47.

<sup>166</sup> *Id.* at 147–48.

<sup>167</sup> *State v. Broom*, 51 N.E.3d 620 (Ohio 2016); see also, *After Initial Botched Execution of Romell Broom, Ohio Supreme Court Gives Approval for State to Try Again*, DEATH PENALTY INFO. CTR. (Mar. 17, 2016), <https://deathpenaltyinfo.org/node/6408>; 2017 OHIO ATT'Y GEN. CAPITAL CRIMES ANN. REP. 66, <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/>

In 2016, the Ohio Supreme Court ruled 4-to-3 that Broom could be subjected to a second execution because the drugs were never administered and that this would not shock the conscience so long as the execution was carried out in a constitutional manner.<sup>168</sup>

It remains to be seen whether Ohio will stay with lethal injection or attempts to move to another method.<sup>169</sup> One advocate recently commented that Ohio has been engaged in suffocating, burying alive, and burning alive its inmates—hardly a humane or tolerable punishment, and hardly “a quick and painless death.”<sup>170</sup>

Arguments of inhumane punishment, uneven application, the risk of executing the innocent, the lack of absolute necessity due to the availability and preference for life sentences, and the cost of the death penalty, are all issues that still resonate and animate the present state of Ohio death law.

## II. FORMAL REVIEWS OF OHIO’S DEATH PENALTY SYSTEM

Since 1981, Ohio’s death penalty system has been thrice reviewed, by: the Ohio State Bar Association in 1997, the American Bar Association in 2007, and the Joint Ohio Supreme Court and Ohio State Bar Association Task Force in 2014. Each of these reviews was a multi-year project. What follows is an overview summarizing the recommendations for reform made by each body. The full reports of each body should be examined for a full appreciation of the deficiencies each body identified and the solution recommended.

### A. *The Ohio State Bar Association Report (1997)*

The Ohio State Bar Association (“OSBA”) Criminal Law Justice Committee produced a report that was adopted by the Council of Delegates in November 1997.<sup>171</sup> The report was later updated to appear in the Ohio State Law Journal’s 2002 “Symposium: Addressing Capital Punishment Through Statutory Reform” as “The Death Penalty in Ohio: Fairness, Justice, and Reliability at Risk,” by the

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2017-ANNUAL-REPORT-WEB (litigation continues in the federal courts); LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 70–71 (LexisNexis 3d ed. 2012).

<sup>168</sup> *Id.*

<sup>169</sup> Karen Kasler & Andrew Welsh-Huggins, *Gov. DeWine Delays Three More Executions*, WOSU PUBLIC MEDIA (Mar. 7, 2019), <https://radio.wosu.org/post/gov-dewine-delays-three-more-executions#stream/0> (veteran Franklin County prosecutor suggested lawmakers review the possibility of using nitrogen gas, and current prosecutor Ron O’Brien has agreed that such review is “needed to avoid repeated delays of lawful sentences”).

<sup>170</sup> The advocate referenced is Allen Bonhert, an Assistant Federal Public Defender in the Southern District of Ohio. He made the comment to the Author at a conference.

<sup>171</sup> S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—A Report on Reforms in Ohio’s Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L. J., 371–72 (2002).

primary drafter of the initial report, S. Adele Shank. It represents the position of the OSBA in 1997.<sup>172</sup>

The OSBA did not call for a moratorium as such, but called for individual case review before any execution and systemic changes.<sup>173</sup> The Report targeted the absence of consistent and even-handed application of the death penalty, and the Ohio system's unreliability.<sup>174</sup> Particularized concerns identified in the OSBA Report, updated in Ms. Shank's article (and most still problems today), included:

1. The underfunding of indigent capital defense;<sup>175</sup>
2. Charging decisions that varied from county to county;<sup>176</sup>
3. The continual legislative expansion of death-eligibility by additions to the aggravated murder and aggravating circumstance provisions;<sup>177</sup>
4. Failing to exclude the mentally retarded from execution;<sup>178</sup>
5. Judicial expansion of the purposely culpable mental state by use of presumptions arising from one's acts rather than requiring evidence of specific intent to kill;<sup>179</sup>
6. The diminution of the mental state required for a finding of prior calculation and design;<sup>180</sup>
7. Fundamentally altering the while committing a felony requirement in aggravated felony-murder cases;<sup>181</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 373.

<sup>174</sup> *Id.* at 372–73.

<sup>175</sup> *Id.* at 379–82.

<sup>176</sup> *Id.* at 382–85 (recommending elimination of the felony-murder specification O.R.C. § 2929.04(7), and a narrowed definition of the aggravated felony-murder statute O.R.C. § 2903.01(B), and noting that current sentencing options on a given set of facts could range from incarceration for three years to death, depending on a prosecutor's rather unguided predilections).

<sup>177</sup> *Id.* at 385–86.

<sup>178</sup> *Id.* at 386–87. This was achieved by the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>179</sup> Shank, *supra* note 171, at 387–90.

<sup>180</sup> *Id.* at 390–91.

<sup>181</sup> Shank, *supra* note 171, at 391–92 (noting the Ohio Supreme Court's decisions have expanded the term “while” with respect to “felony-murder,” “aggravated murder,” and “aggravating circumstance”; by its plain language “while” would require that the defendant either be in the course of committing a felony or be attempting to commit or attempting to flee after committing a felony). *But see* State v. Williams, 660 N.E.2d 724, 733 (Ohio 1996); State v. Cooley, 544 N.E.2d 895, 903 (Ohio 1989) (in which the Ohio Supreme Court found that “neither the felony-murder statute nor Ohio case law requires the intent to commit a felony to precede the murder . . .”; that this insupportable interpretation “negat[ed] the rationale for Ohio's felony murder rule—that the high-risk behavior of committing the felony substitutes for prior calculation and design” (otherwise required for aggravated murder culpability); and that in order to trigger the statute's application, the death needs to “be in furtherance of the felony or in consequence of the felony.”). *See also* Dana K. Cole, *Expanding Felony-*



8. Racial bias and patterns of racial disparity;<sup>182</sup>
9. Inadequate and changing jury instructions making for inconsistent decision-making;<sup>183</sup>
10. Denial of lesser offense instructions;<sup>184</sup>
11. Multiple burdens placed on the defendant's effort to defend (limits on the use of expert mental health evidence and a narrowed insanity test, allocation of burdens of proof of affirmative defenses, and a lowered standard of proof in circumstantial evidence cases);<sup>185</sup>
12. The impact of the removal of the intermediate court of appeals review,<sup>186</sup> post-conviction remedies are unavailable and/or inadequate in terms of compensation/training/appointment of conflict counsel/timing of petition;<sup>187</sup>
13. The failure to provide an indigent capital defendant with a copy of the transcript;<sup>188</sup> and
14. Stays of execution requests should go to the court presently having jurisdiction over the case instead of the Ohio Supreme Court.<sup>189</sup>

The OSBA Report concluded that “no individual should be executed unless and until it is determined that none of the factors identified in this report has undermined the reliability of the capital sentence.”<sup>190</sup> An Epilogue related that many of the recommendations had not yet been implemented, and noted a moratorium bill

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*Murder in Ohio: Felony-Murder or Murder-Felony*, 63 OHIO ST. L. J. 15 (2002) (OSBA recommends either eliminating the felony-murder specification O.R.C. § 2929.04(A)(7) or returning to its plain meaning).

<sup>182</sup> Shank, *supra* note 171, at 393–95 (referencing national studies, and testimony and findings of the 1999 Ohio Commission on Racial Fairness).

<sup>183</sup> *Id.* at 395–99 (noting the helpful adoption of standardized jury instructions in 2000, but continuing concern over those sentenced before).

<sup>184</sup> *Id.* at 399–400.

<sup>185</sup> *Id.* at 400–03. See further discussion later in this article regarding a pending bill to exclude the severely mentally ill from execution.

<sup>186</sup> *Id.* at 404–05 (the Report recommended the OSBA conduct a study of the impact on decisions and the burdens on the Ohio Supreme Court. The update relates that Attorney General Betty Montgomery criticized the Ohio Supreme Court for failing to handle the cases fast enough and that Chief Justice Moyer stated it was understood the high court's review “would be extensive and time consuming” following the removal of the court of appeals review).

<sup>187</sup> *Id.* at 405–11 (discussing how the law has improved on several of these issues since 2002); see OHIO REV. CODE ANN. §§ 2953.21–2953.25.

<sup>188</sup> Shank, *supra* note 171, at 408.

<sup>189</sup> *Id.* at 411–13.

<sup>190</sup> *Id.* at 414.

submitted to the Ohio House in the 1999–2000 period as an attempt to correct the unreliability in capital cases.<sup>191</sup>

However, Ohio had largely failed in its efforts to assure reliable decision-making, assure against arbitrary and discriminatory sentencing, consider all relevant mitigating facts, and reserve the penalty for the worst of the worst.

*B. The ABA Ohio Death Penalty Assessment Project and Report (2007)*<sup>192</sup>

Throughout its history, the American Bar Association (“ABA”) has worked to assure the American people a fair and accurate criminal justice system that accords due process and delivers justice to society and to those who are accused. In large part, the ABA has done that by developing standards addressing each component of the criminal justice system, from investigation of crimes, to trials, to appeals, post-conviction, and petitions for clemency.

In 1997, the ABA concluded that death penalty systems across the U.S. failed to deliver that standard of justice.<sup>193</sup> Although the ABA takes no position on the death penalty itself, in 1997 it called for all death penalty jurisdictions across the country to impose a temporary halt on actual executions—pending detailed review of their death penalty system to assure delivery of fair and accurate justice that accords each defendant due process under the law, and seeks to avoid wrongful executions.<sup>194</sup>

To assist the states and federal government in conducting such reviews, the ABA Section of Individual Rights and Responsibilities developed protocols setting benchmarks for criminal justice systems that administer the death penalty fairly and accurately.<sup>195</sup> The ABA subsequently launched its state death penalty assessment project. Ohio was the seventh of eight states evaluated under that project.<sup>196</sup>

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<sup>191</sup> Shank, *supra* note 171, at 414.

<sup>192</sup> See Margery M. Koosed, *Trying to Get It Right—Ohio from the Eighties to the Teens*, 43 HOFSTRA L. REV. 783 (2015).

<sup>193</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report, An Analysis of Ohio’s Death Penalty Laws, Procedures, and Practices*, AM. BAR ASS’N (2007), <https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/ohio/finalreport.pdf> [hereinafter *Evaluating Fairness*].

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at i–ii. The protocols were set out in *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, AM. BAR ASS’N (2001), <http://www.americanbar.org/content/dam/aba/migrated/irr/finaljune28.authcheckdam.pdf> [hereinafter *Death Without Justice*].

<sup>196</sup> Deborah Fleischaker, *ABA State Death Penalty Assessments: Facts (Un)Learned, Progress To Be Made, and Lessons Learned*, A.B.A. HUMAN RIGHTS MAGAZINE (June 30, 2017), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol34\\_2007/spring2007/hr\\_spring07\\_fleis/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol34_2007/spring2007/hr_spring07_fleis/) (other states evaluated by the ABA were: Alabama, Arizona, Florida, Georgia, Indiana, Tennessee, and Pennsylvania).

The Ohio assessment was conducted by a balanced team of Ohio legal experts,<sup>197</sup> who conducted a two-and-a-half-year study.<sup>198</sup> The team was not asked to decide whether Ohio should have the death penalty, nor did it consider the issue. Instead, the Ohio Death Penalty Assessment Team was asked to examine the Ohio death penalty system and make recommendations on how it could be improved.

The Ohio Team and the ABA released its 400-plus-page Report on September 24, 2007. At a news conference that day, the Team and the ABA announced its findings; of ninety-three ABA protocols, Ohio fully complied with only four, partially met thirty-seven, totally failed to comply with twenty-eight, and due to limited access to information, the Team could not assess Ohio's compliance with twenty-three of the protocols.<sup>199</sup> The ABA Team concluded this is not a system that delivers the justice citizens of Ohio expect.<sup>200</sup>

The Team announced fourteen specific recommendations to help Ohio achieve the justice that the victims of crime, their families and friends, and all Ohioans deserve.<sup>201</sup> The ABA joined the Ohio Assessment team in encouraging the State of

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<sup>197</sup> Congresswoman Stephanie Tubbs Jones (member of the United States House of Representatives and former Cuyahoga County Prosecutor and trial judge); Judge Craig Wright (a judge on the Ohio Court of Claims and a former justice of the Ohio Supreme Court); Senator Shirley Smith, (member of the Ohio State Senate); Judge Michael Merz (Chief Magistrate Judge in the U.S. District Court for the Southern District of Ohio); Geoffrey Mearns (Dean and Professor of Law at Cleveland-Marshall College of Law and former Assistant U.S. Attorney for the Eastern District of North Carolina and the Eastern District of New York); Mark Godsey (Professor of Law at the University of Cincinnati College of Law and Director of the Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project and former Assistant U.S. Attorney for the Southern District of New York); S. Adele Shank (lawyer in private practice doing criminal defense and author of the OSBA article described earlier, former General Counsel to the Ohio Public Defender and former assistant county prosecutor); David Stebbins (lawyer in private practice doing criminal defense and former Chief of the Ohio Public Defender Death Penalty Unit); this author, Marge Koosed (Professor of Law at The University of Akron School of Law); and the Chair of the Ohio Assessment Team, Phyllis Crocker (Associate Dean and Professor at the Cleveland-Marshall College of Law). *See, Evaluating Fairness*, *supra* note 193, at 3–6.

*See also* Koosed, *supra* note 192, at 811–12 (the Ohio Prosecuting Attorneys Association would later attempt to discount the Team's Report for not having any sitting prosecutors on it, but in fact the Ohio Attorney General's Office Death Penalty Unit was repeatedly invited to join the Team and did not do so. The OPAA also wanted to ignore the fact that the Team already included two former prosecutors who had actively sought the death penalty (Jones and Mearns) and two who prosecuted lesser crimes (Godsey and Shank). In the end, the Ohio Prosecuting Attorneys Association did not want to confront or even discuss the ABA Assessment or its recommended reforms.).

<sup>198</sup> Jeff Coryell, *ABA Death Penalty Assessment Team Calls for Suspension of Executions in Ohio*, CLEVELAND.COM (Sept. 24, 2007), [http://blog.cleveland.com/wideopen/2007/09/aba\\_death\\_penalty\\_assessment\\_t.html](http://blog.cleveland.com/wideopen/2007/09/aba_death_penalty_assessment_t.html).

<sup>199</sup> *Ohio Death Penalty 'Flawed,' Bar Association Says in Calling for Moratorium*, GONGWER OHIO (Sept. 24, 2007), <http://www.gongwer-oh.com/programming/login.cfm?link=http://www.gongwer-oh.com/programming/mygongwer.cfm?&CFID=10854051&CFTOKEN=801ac1fde851928e-F0A4CAD0-2590-49FC>; *see generally*, *Evaluating Fairness*, *supra* note 193.

<sup>200</sup> *Evaluating Fairness*, *supra* note 193, at iii.

<sup>201</sup> *Id.* at vii–viii.

Ohio to conduct a study/review into the many areas the Ohio Death Penalty Assessment Team could not address, as well as the problems already identified in the study.<sup>202</sup>

The ABA also urged Ohio authorities to temporarily suspend executions until the problems raised in the ABA report could be addressed so as to provide Ohioans with confidence that justice is being served before the State took a life in their names.<sup>203</sup> The Team stated that regardless of one's view as to the death penalty's morality, it is beyond question that if Ohio is to have a death penalty, it must be accurate, fair, and provide due process to all capital defendants and death row inmates.<sup>204</sup> Unfortunately, the ABA Assessment Team found this was not the case.<sup>205</sup> In its review, the Ohio Death Penalty Assessment Team found a number of problems in the state's death penalty system, all of which undermine the fairness and accuracy of the system.

Among its areas of focus, the ABA study addressed racial and geographic disparities in the implementation of the death penalty. The ABA studied homicides in Ohio between 1981 and 2000, "in order to identify potential racial and geographic factors that correlate with the decision to sentence defendants to death."<sup>206</sup> The ABA found a relationship between the victim's race and imposition of the death penalty—in Ohio, those who kill whites are 3.8 times more likely to receive a death sentence than those who kill blacks;<sup>207</sup> an Associated Press study conducted two years earlier (referenced in the ABA study) found a twice as likely relationship.<sup>208</sup> The ABA also found considerable geographic disparities—a Hamilton County defendant is 2.7 times more likely to receive a death sentence relative to the rest of Ohio, 3.7 times more likely than in Cuyahoga County, and 6.2 times more likely than in Franklin County.<sup>209</sup>

To facilitate review of its 400-plus page report, the Team highlighted "the following problem areas as most in need of reform":<sup>210</sup> inadequate procedures to protect innocent defendants; inadequate access to experts and investigators; inadequate legal representation; inadequate appellate review of claims of error; lack of meaningful proportionality review of death sentences; virtually nonexistent discovery provisions in state post-conviction; racial and geographic disparities in

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<sup>202</sup> See GONGWER, *supra* note 199.

<sup>203</sup> *Id.*

<sup>204</sup> See *Evaluating Fairness*, *supra* note 193, at i–ii.

<sup>205</sup> See *id.* at iii–iv, vii.

<sup>206</sup> *Id.* at 357.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 356; see also WELSH-HUGGINS, *supra* note 11, at 80–82.

<sup>209</sup> *Evaluating Fairness*, *supra* note 193, at 357. For a further discussion of the ABA Task Force's work and recommendations, and race concerns in particular, see generally Alice Lynd, *Unfair and Can't Be Fixed: The Machinery of Death in Ohio*, 44 U. TOL. L. REV. 1 (2012).

<sup>210</sup> *Evaluating Fairness*, *supra* note 193, at iv.

Ohio's capital sentencing; and death sentences imposed or carried out on people with severe mental disabilities.<sup>211</sup> The number and significance of these problems led the Team to call for a temporary suspension of executions until these problems are addressed.<sup>212</sup>

The Team also made a series of specific recommendations that, if implemented, would significantly improve the fairness and accuracy of Ohio's death penalty system. These recommendations included (in condensed form):

1. Require all biological evidence be preserved in all potentially capital cases for as long as the defendant remains incarcerated;
2. Require videotaping the entirety of custodial interrogations in homicide cases;
3. Implement mandatory lineup procedures using national best practices;
4. Create a commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases;
5. Adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction and any other related proceedings;
6. Ensure proportionality in capital cases by developing laws and procedures to eliminate racial, geographic and other disparities.
7. More vigorously enforce requirements that prosecutors disclose to the defense all evidence or information that tends to negate guilt or mitigate punishment;
8. Promptly appoint separate counsel for direct appeal and state postconviction;
9. More thorough Supreme Court review, relaxing waiver rules and decreasing the use of harmless error;
10. Amend state rules and statutes to allow a defendant to engage in discovery and develop the factual basis of his/her claims prior to filing his/her post-conviction petition, and amend state laws to allow petitioners to use the public records laws to obtain materials in support of post-conviction claims;
11. Create a publicly accessible database on all potentially death-eligible cases, providing prosecutors with relevant information to assist them

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<sup>211</sup> *Id.* at iv–v (each problem identified in these pages includes a reference to the Chapter or Chapters in which the topic is addressed at length).

<sup>212</sup> *See id.* at viii.

in making charging decisions, and provide the Supreme Court with information for proportionality review;

12. A more searching sentence review in the Ohio Supreme Court to ensure that death is imposed only for the worst offenses and on the worst offenders;
13. Conduct and release a state-sponsored comprehensive study to determine the existence or non-existence of unacceptable disparities in the Ohio death penalty system and provide a mechanism for ongoing study of these factors; and
14. Adopt a law or rule excluding individuals with serious mental disorders other than mental retardation from being sentenced to death and/or executed.<sup>213</sup>

The problems identified in the ABA Report were quite serious and required a serious, thoughtful response. It was for that reason the Team encouraged the Governor to impose a temporary suspension of executions to look into the problems identified. But no suspension occurred as a consequence of the ABA Report. A temporary suspension did develop nationwide as a consequence of the United States Supreme Court's decision to review the constitutionality of the lethal injection process, which ended with the *Baze v. Rees* decision.<sup>214</sup>

Though neither the Governor nor the legislature ordered a death penalty study, for a brief time, there appeared to be interest in a race study.<sup>215</sup> But this too fizzled. And for a while it seemed as though the Prosecuting Attorneys Association's contention that the 2007 Report should be ignored, because no sitting prosecutors had participated in the Report's preparation, might carry the day.<sup>216</sup> Fortunately, however, calmer heads prevailed and some aspects of the Assessment Team's recommendations began to get attention; indeed, the legislature even passed some measures.

The Assessment Team's 2007 Report called for several reforms designed to reduce the probability of innocents being convicted and sentenced to death.<sup>217</sup> In response, a state-of-the-art Innocence Protection Act<sup>218</sup> was passed with the support

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<sup>213</sup> *Evaluating Fairness*, *supra* note 193, at vi–vii.

<sup>214</sup> *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>215</sup> See WELSH-HUGGINS, *supra* note 11, at 82 (John Murphy, Executive Director of the OPPIA, conceded “there does seem to be a disparity there”).

<sup>216</sup> See Maureen O'Connor, Chief Justice, Supreme Court of Ohio, First State of the Judiciary Address (Sept. 8, 2011) [hereinafter Judiciary Address], available at [http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ\\_090811.asp](http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ_090811.asp) (announcing the creation of a task force including prosecutors); see also Phyllis Crocker, *O'Connor's Firsts*, 48 AKRON L. REV. 79, 81–83 (2015).

<sup>217</sup> *Evaluating Fairness*, *supra* note 193, at v–vii.

<sup>218</sup> S.B. 77, 128th Gen. Assemb. (Ohio 2010) (its reforms included practices respecting preservation of evidence, eyewitness identification procedures, and videotaping of interrogations).

of the former Ohio Attorney General, Republican James Petro, and the Ohio Innocence Project.<sup>219</sup> The bill made significant changes with respect to: preservation and testing of evidence; criteria for post-conviction DNA testing; eyewitness identification procedures; and the recording of interrogations.<sup>220</sup> The same ABA-identified concern yielded significant discovery reforms as defense counsel and former and present prosecutors sat down to hammer out revisions to the Ohio Criminal Rule 16.<sup>221</sup> The Ohio Supreme Court also took action on matters relating to effective assistance of counsel.<sup>222</sup> So, though not explicitly crafted to respond to the Report as such, some needed reforms were being made between 2007 and 2011.

However, when it came to discussing the ABA's suggested revisions specific to the death penalty system, these same present and former prosecutors were unwilling to meet with ABA Report defenders or others. Multiple entreaties to do so were made by this author (as chair of the OSBA Death Penalty Subcommittee), and by the chair of the Criminal Justice Committee itself, the OSBA Legislative Director, the OSBA President, and others. But to no avail. The OSBA believed it was critical that it review and respond to the Assessment Team's 2007 Report, but felt it would not be practical or appropriate to go forward without prosecution representatives.<sup>223</sup> After over three years of fruitless entreaties, the OSBA took the matter to the Ohio Supreme Court.<sup>224</sup>

The newly elected Chief Justice O'Connor, a former county prosecutor and

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<sup>219</sup> See, *Call the Roll: Lawmakers Should Pass Long-Delayed Criminal-Justice Bill*, COLUMBUS DISPATCH (Mar. 9, 2010, 6:18 AM), <http://www.dispatch.com/content/stories/editorials/2010/03/09/call-the-roll.html> (former Ohio Attorney General Petro became the first attorney general in the country to work with an Innocence Project to free an inmate); see also T.C. Brown, *Jim Petro's Crusade*, COLUMBUS MONTHLY (Oct. 2010), <http://www.columbusmonthly.com/content/stories/2010/10/jim-petro039s-crusade.html> (Petro continued working with the Project when he left office and returned to private practice).

Jim and his wife, Nancy Petro, authored the excellent volume *False Justice: Eight Myths that Convict the Innocent*, and other shorter pieces. See, e.g., Jim Petro & Nancy Petro, *Jim Petro: Ohio Shouldn't Risk Executing Innocent*, CINCINNATI.COM (Sept. 19, 2014, 5:00 PM), <http://www.cincinnati.com/story/opinion/contributors/2014/09/19/jim-petro-ohio-risk-executing-innocent/15892555>. Nancy is a regular contributor to the Wrongful Convictions Blog, and the two continue to intensively work to improve the reliability of our justice system in Ohio, the nation, and internationally. See, e.g., Nancy Petro, *\$9.2 Million Awarded in Wrongful Conviction that Underscores FBI Forensic Problems*, WRONGFUL CONVICTIONS BLOG (Feb. 28, 2015), <http://wrongfulconvictionsblog.org/2015/02/28/9-2-million-awarded-in-wrongful-conviction-revealed-in-fbi-lab-review/#more-19605>.

<sup>220</sup> *Call the Roll*, *supra* note 219.

<sup>221</sup> See OHIO REV. CODE ANN. CRIM. R. 16 (West 2014).

<sup>222</sup> See Margery M. Koosed, *Trying to Get it Right—Ohio From the Eighties to the Teens*, 43 HOFSTRA L. REV. 783, 815–17 (2015) (discussing amendments to Rule 20 relating to qualifications, monitoring of counsel, and best practices expectations).

<sup>223</sup> Judiciary Address, *supra* note 216 (discussing the Joint Task Force to Review the Administration of Ohio's Death Penalty being formed by the Supreme Court of Ohio and the Ohio Bar Association, which will be comprised of a number of individuals, including prosecutors).

<sup>224</sup> See *id.*

Lieutenant Governor overseeing the State Department of Public Safety, expressed that she too had concerns, and that the 2007 Report “got [her] to thinking.”<sup>225</sup>

Chief Justice O’Connor may well have been thinking, too, of the views expressed by the senior judge on the Court, Paul E. Pfeifer, a contributor to this Symposium. Justice Pfeifer helped write Ohio’s 1981 death penalty legislation while a state senator, but evolved from working on the enactment of that law to becoming a justice in 1994, who, by 1999, was “wondering if the first execution under the death penalty law is a step that we really want to take.”<sup>226</sup> In 2011, Justice Pfeifer wrote an “opinion piece” urging that it was time to end capital punishment in Ohio, and so testified before the Ohio Legislature.<sup>227</sup>

Chief Justice O’Connor agreed that a review and response to the 2007 Report was overdue, and determined to create a joint task force, comprised of all the appropriate stakeholders, including prosecutors.<sup>228</sup>

### C. *The Ohio Supreme Court’s Joint Task Force Report (2014)*

In September 2011, Chief Justice O’Connor announced the appointment of a Joint Task Force to Review the Administration of Ohio’s Death Penalty (“Joint Task Force”).<sup>229</sup> The Joint Task Force’s purpose was

to review the 2007 American Bar Association report titled “Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report” and offer an analysis of its findings; assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and determine if the administrative and

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<sup>225</sup> Joe Frolik, *Seeking Fairness on Death Row*, CLEV. PLAIN DEALER, Sept. 27, 2011, at A7.

<sup>226</sup> Koosed, *supra* note 222, at 819 (citing Ohio Supreme Court press release issued by Paul E. Pfeifer, J., a week before the execution of volunteer Wilford Berry, and titled: *Of Justice and Executions* (Feb. 10, 1999)).

<sup>227</sup> Paul E. Pfeifer, *Retire Ohio’s Death Penalty: Paul E. Pfeifer*, CLEVELAND.COM (Jan. 26, 2011, 4:00 AM), [http://www.cleveland.com/opinion/index.ssf/2011/01/retire\\_ohios\\_death\\_penalty\\_pau.html](http://www.cleveland.com/opinion/index.ssf/2011/01/retire_ohios_death_penalty_pau.html) (same). See generally Frolik, *supra* note 225; Andrew Welsh-Huggins, *Ohio Justice Rejects Death Penalty Law He Wrote*, AKRON LEGAL NEWS, Feb. 21, 2012, at 1 (indicating that in January 2011, Justice Pfeifer urged newly-elected Governor John Kasich “to empty death row”)

Justice Pfeifer also testified before the Ohio Legislature in December 2011 in favor of a bill to abolish the death penalty: “I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole . . . I don’t see what society gains from that.” Koosed, *supra* note 222, at 819 n.259. Though he has upheld death sentences, he has dissented on some cases, urging that the sentence “should be ‘reserved for those committing what the state views as the most heinous of murders.’” *Id.* Though two county prosecutors moved to recuse him from hearing death cases, Chief Justice O’Connor had said she was “comfortable Pfeifer is following the law and not showing bias.” *Id.*

<sup>228</sup> *Judiciary Address*, *supra* note 216.

<sup>229</sup> *Id.*



procedural mechanisms for the administration of the death penalty in Ohio are in proper form or in need of adjustment.<sup>230</sup>

The Joint Task Force was expressly barred from undertaking the questions of whether Ohio should abolish the death penalty or how executions should be carried out.<sup>231</sup>

The Joint Task Force's composition was balanced. Chaired by retired Court of Appeals Judge Brogan and Vice-Chaired by Common Pleas Judge McIntosh, there were six other judges,<sup>232</sup> four legislators, four prosecutors, including the State Attorney General's representative,<sup>233</sup> three defense counsel, including the State Public Defender,<sup>234</sup> two law professors,<sup>235</sup> one Sheriff, and one representative of the Department of Rehabilitation and Corrections.

Prosecutorial participation was uneven. One prosecutor regularly attended, but another came to only a few of the dozen-plus meetings of the Joint Task Force, and never attended the meetings of the Defense Services Committee of which he was a member,<sup>236</sup> nor participated in the Defense Services Committee's conference calls. At one point, the same prosecutor proffered his view that the Joint Task Force was simply there to abolish the death penalty and offered to join in such a motion, to which a few members chuckled and seconded the motion. Both the Chief Justice and the Chair were dismayed by this prosecutor's frequent absences, and it is possible this impaired the ability of the Joint Task Force to receive input and/or occasionally reach a greater consensus on matters before it.<sup>237</sup> So, while the Chief Justice's intervention in the earlier impasse and creation of the Joint Task Force is

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *See id.* (two judges were from Cuyahoga County (Cleveland), one from Lucas County (Toledo), and two from rural counties (Belmont and Champaign)).

<sup>233</sup> *See id.* (the other three were from Hamilton County (Cincinnati), Cuyahoga County (Cleveland), and Trumbull County (Warren)).

<sup>234</sup> *See id.* A fourth individual, veteran civil litigator Samuel Porter of Porter Wright Morris & Arthur LLP in Columbus, was Chair of the Ohio Public Defender Commission, and attended until his untimely death in May 2013. He was not replaced despite several requests to do so.

<sup>235</sup> *See id.* One of the professors, Phyllis Crocker of Cleveland Marshall Law School, was Chair of the ABA Assessment Team. The other, Douglas Berman of Ohio State University Law School, writes a federal sentencing blog and textbook. The Author of this Article served as an informal resource person at the behest of the Chair Judge Brogan and was occasionally called upon to offer historical information or other assistance.

<sup>236</sup> *See id.* As the Author observed, he sometimes simply sat in a room down the hall and read while the Defense Services Subcommittee met.

<sup>237</sup> The Prosecutorial Issues Subcommittee submitted a number of proposals that would make it easier to obtain death sentences, and very few passed. *See* Alan Johnson, 'With These Rules, You Couldn't Execute Timothy McVeigh,' *Argues Task-Force Dissent*, COLUMBUS DISPATCH (Apr. 11, 2014, 5:25 AM), <http://www.dispatch.com/content/stories/local/2014/04/10/death-penalty-task-force.html> (after this, there seemed to be a drop in attendance).

to be highly commended,<sup>238</sup> it did not fully solve the problem of prosecutorial unwillingness or ambivalence about participating.<sup>239</sup>

The Joint Task Force met from early 2012 to spring 2014, and completed the text of its Final Report and Recommendations in April 2014.<sup>240</sup> The Joint Task Force released the Final Report on May 21, 2014.<sup>241</sup> Chief Justice O'Connor thanked the Joint Task Force for its work and commented that "no one can disagree that as long as Ohio does have a death penalty we should have the fairest and most reliable system possible."<sup>242</sup> The Chief Justice's concern for the reliability of Ohio's death penalty system was apt, considering that, at the time of her statement, five men sentenced to death since 1977 had been exonerated.<sup>243</sup> Two more men were added

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<sup>238</sup> Crocker, *supra* note 216, at 80–90.

<sup>239</sup> *Id.* at 87 (indeed, at the final meeting of the Joint Task Force on April 10, 2014, another prosecutor conveyed that some prosecutors agreed to join the Joint Task Force only when they were promised a minority or dissenting report would be possible, and one was filed).

The county prosecutors in attendance were most adamant in their opposition to a proposed recommendation that would call for county prosecutors to submit intended capital charges to a review and approval process in the Attorney General's Office. The Joint Task Force ultimately approved the measure as a means of reducing geographical disparity in the application of Ohio's death penalty. *See, e.g.,* Robert Higgs, *Task Force Suggests Panel to Screen Death Penalty Cases Review of Decisions by Prosecutors Would Aim to End Disparities*, CLEV. PLAIN DEALER, June 15, 2013, at A1. On the other hand, a month later, the newly-elected Cuyahoga County (Cleveland) Prosecutor decided to conduct a pre-execution review of an earlier imposed county death sentence, and advised the Ohio Parole Board that his office supported clemency for inmate Billy Slagle because it was unlikely the case would result in a death sentence today. Associated Press, *Prosecutor: Condemned Ohio Man Should Be Spared*, TOLEDO BLADE (July 4, 2013), <http://www.toledoblade.com/State/2013/07/03/Prosecutor-Condemned-Ohio-man-should-be-spared.html>. The Ohio Parole Board was divided but denied clemency, as did the Governor. Vicki A. Werneke, *Loss of Hope*, NAT'L COALITION TO ABOLISH DEATH PENALTY (Aug. 6, 2013), <http://www.ncadp.org/blog/entry/loss-of-hope> (however, the prosecutor's office then contacted defense counsel with the news that their file apparently revealed that a plea to life had been offered and never conveyed to the client pre-trial, and that the prosecutor's office would be willing to support a stay of execution on this basis; tragically, Slagle committed suicide in his cell before his lawyers could advise him of this development).

<sup>240</sup> *See generally* JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY: FINAL REPORT & RECOMMENDATIONS (2014), <http://www.supremecourtsohio.gov/Boards/deathPenalty/resources/finalReport.pdf> [hereinafter FINAL REPORT]. For ease of analysis and comparison, the ABA Task Force Report appears in Appendix A.

<sup>241</sup> Chris Davey, *Death Penalty Task Force Releases Final Report*, CT. NEWS OHIO (May 21, 2014), [http://www.courtnewssohio.gov/happening/2014/deathPenaltyTFReport\\_052114.asp#.XVw\\_5C2ZOL8](http://www.courtnewssohio.gov/happening/2014/deathPenaltyTFReport_052114.asp#.XVw_5C2ZOL8).

<sup>242</sup> *Id.*

<sup>243</sup> Rachel Dissell, *Who Are Ohio's Exonerated? 42 Have Been Freed After Wrongful Convictions in the Past 25 Years*, CLEV. PLAIN DEALER, Nov. 22, 2014, at A7 (displaying a chart referencing National Registry of Exonerations data showing five death sentenced inmates, and over thirty non-capitally sentenced inmates, have been exonerated since 1977). Ricky Jackson and Wiley Bridgeman, both sentenced to death, have now been added to the National Registry of Exonerations list; *see, Wiley Bridgeman*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4554> (last visited Apr. 12, 2015).

in the months that followed, one of whom served more time behind bars—thirty-nine years—than any other exoneree at the time.<sup>244</sup> The Chief Justice’s words, that she would “study this report very closely, and [expects] that the governor and the members of the General Assembly” would do the same, were received quite favorably.<sup>245</sup>

The Joint Task Force operated by majority vote and ultimately made fifty-six recommendations.<sup>246</sup> Recommendations were listed by order of adoption, rather than by topic area. To facilitate understanding, this summary groups recommendations by topic, and provides updates identifying resulting law changes, if any.

The next section will address the recommendations of the Joint Task Force, identifying those which have been adopted, and highlighting those being urged with the greatest vigor<sup>247</sup> (as well as their prospects for success). In 2019, five years after the final task force report was issued, not much progress has been made.

### III. KEY RECOMMENDATIONS OF THE 2014 JOINT TASK FORCE

#### A. *Assuring Adequate Defense Services*

The Joint Task Force responded to the ABA Assessment Team’s three concerns relating to counsel and support services. Early on, the Joint Task Force unanimously approved a measure that the Ohio Supreme Court should take the lead in adopting a uniform process for the selection of indigent counsel in capital cases. This process would include establishing a uniform fee and expense schedule, so that appointed counsel would be paid equally throughout the state, regardless of the county in which

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<sup>244</sup> John Caniglia, *Freedom ‘Finally! Finally!’ Exonerated Friends Leave Prison After More Than 39 Years Behind Bars*, CLEV. PLAIN DEALER, Nov. 21, 2014, at A1 (relating release of co-defendants Ricky Jackson and Wiley Bridgeman); *see also* John Caniglia, *Inmate of 39 years to Go Free After Witness Recants*, CLEV. PLAIN DEALER, Nov. 19, 2014, at A1 (noting that, the witness, a twelve-year-old boy, had wished to help the police, though he had seen nothing; police fed him information, and when he wished to recant, police told him they would put his parents on trial for perjury, so he had waited decades to tell the authorities); James F. McCarthy, *Man Held 39 Years Is Granted \$1 Million*, CLEV. PLAIN DEALER, Mar. 20, 2015, at A1.

<sup>245</sup> Davey, *supra* note 241 (OSBA President Jonathan Hollingsworth also thanked the Joint Task Force, asserting “there is much work still to be done” and that the OSBA would be “convening some of our committees and others with expertise in the area of criminal justice for that review” of the Report. It does not appear that the Criminal Justice Committee has addressed the Task Force Report as a whole, but specific bills are being reviewed and supported by the OSBA legislative staff).

<sup>246</sup> *Id.*

<sup>247</sup> Additional voices are urging suspension of executions until reforms are made. *See* Jim Petro & Lee Fisher, *Kasich should block resumption of executions till reforms are made*, CLEV. PLAIN DEALER, July 21, 2017, at E2 (the authors are both former state attorneys general); *see also* (former governor) Bob Taft, *Pause Ohio’s death penalty to make it more humane, fair*, COLUMBUS DISPATCH (Mar. 10, 2019), <https://www.dispatch.com/opinion/20190310/column-pause-ohios-death-penalty-to-make-it-more-humane-fair>.

the crime occurred.<sup>248</sup> A uniform fee of \$125 per hour is now law,<sup>249</sup> but this did not address expense schedules. Another unanimous measure urged enacting legislation to fund a Capital Litigation Fund to pay all fees and expenses of prosecution and defense at all levels of capital litigation.<sup>250</sup>

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<sup>248</sup> Recommendations 16, 53, and 54 all addressed this in part. Ohio's eighty-eight counties continued to have very diverse and inadequate fee schedules; little improvement had occurred since 2002. When the Joint Task Force began meeting in 2012, Cuyahoga County (Cleveland) paid a maximum \$25,000 for two attorneys (\$12,500 for each counsel) in capital trials, and just \$5000 in capital appeals. CUYAHOGA CTY. COMMON PLEAS COURT LOCAL RULES 33 (2018), <https://cp.cuyahogacounty.us/media/2317/33.pdf>.

Such fee caps are inconsistent with ABA Guideline 9.1(B)(1) which states: "Flat fees, caps on compensation and lump-sum contracts are improper in death penalty cases." ABA GUIDELINES (2018), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/aba\\_guidelines/2008-supplementary-guidelines/2008-guideline-9-1/](https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/2008-guideline-9-1/). A proposal to increase the fee cap to \$60,000 between two lawyers, with an hourly rate of \$60 in court and \$50 out of court for trials, and to \$15,000 for two lawyers for appeals with a rate of \$95 an hour was passed in 2014. CUYAHOGA CTY. COMMON PLEAS COURT LOCAL RULES 33 (2018), <https://cp.cuyahogacounty.us/media/2317/33.pdf>. But, even these fees were insufficient. As Professor Crocker, Professor Michael Benza at Case Western Reserve University School of Law, and this Author wrote to the Cuyahoga County Commissioner collecting comments on this proposal: "The federal government pays private capital counsel \$178 per hour without a cap." Motion to Remand to Eighth Circuit Court of Appeals at 9, *Ohio v. Sowell*, No. 2012-0153 (Ohio May 11, 2012). The previous federal government amount of \$125 per hour was "universally recognized as a below-market rate for criminal defense lawyers." *United States v. Konrad*, 730 F.3d 343, 351 (3d Cir. 2013). The hourly rate and cap did not provide a level of compensation that will allow lawyers to expend the necessary time and resources to the defense of the case without suffering financial losses. *See, e.g., id.* Even more disturbing, the fee schedules paid only \$170 for handling a post-conviction proceeding that included an evidentiary hearing. CUYAHOGA CTY. COMMON PLEAS COURT LOCAL RULES 33 (2018), <https://cp.cuyahogacounty.us/media/2317/33.pdf>. Though the Ohio Public Defender Office generally litigates capital post-conviction cases, when conflicts arise, they must be handled by a qualified, private, bar-appointed counsel. *See* FINAL REPORT, *supra* note 240, at 9. A maximum fee of \$170 was insulting and amounted to a taking of services. It utterly ignored the hundreds to thousands of hours of time and expense required to properly represent a defendant in post-conviction, let alone the fixed costs of operating a law practice including rent, support staff, online legal research, and other electronic services costs. In addition, in light of later decisions, a very real possibility existed that the U.S. Supreme Court would soon find a constitutional right to effective assistance of post-conviction counsel. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013) (applying *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) to a Texas capital case); *Martinez*, 132 S. Ct. at 1315 (recognizing denial of effective assistance of post-conviction counsel in non-capital cases could excuse a procedural default and allow a federal court to reach the merits of a constitutional claim). This makes the delivery of high-quality representation in post-conviction proceedings all the more important if we are to avoid expensive and time-consuming remands and reversals. As a matter of equity or constitutional mandate, post-conviction counsel should be fairly paid for the substantial and necessary work that they do. *See Shank*, *supra* note 171, at 379.

<sup>249</sup> In 2015, O.R.C. § 120.33(D) was enacted, directing the Ohio Supreme Court to set the fee. In 2016, additional legislation created the Capital Case Attorney Fee Council to set a unified capital case hourly rate for appointed counsel in all counties in all stages of capital litigation. A uniform increased hourly fee of \$125 took effect in September 2017. Memorandum from Tim Young, Office of the Ohio Pub. Def., Regarding New Capital Fees Rate (July 11, 2017).

<sup>250</sup> FINAL REPORT, *supra* note 240, at 8 (Recommendation 13), 21–22 (Recommendations 53 and 54, in part).

The Joint Task Force also unanimously approved a measure urging that the best-qualified counsel be appointed, leaving open whether the present process of appointment by the judiciary would be continued.<sup>251</sup> A divided vote counseled that the present judicial appointment be continued, a position at odds with the ABA Guidelines expectation of an independent appointing body.<sup>252</sup> Later, the Joint Task Force approved 13-3 the appointment of a statewide defender office to handle all indigent capital cases at all levels (except instances when conflict counsel was needed).<sup>253</sup>

In August 2013, the Joint Task Force voted 12-2 that the ABA Guidelines for Appointment and Standards of Performance should be adopted in Ohio.<sup>254</sup> The two votes against adoption came from prosecutors who made it clear that they supported the ABA Guidelines but were concerned with how the measures would be enforced.<sup>255</sup> The Joint Task Force also adopted the ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines”) by a 13-4 vote, with the understanding that this standard was not meant to alter the federal constitutional standard for effective assistance.<sup>256</sup>

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<sup>251</sup> *Id.* at 22.

<sup>252</sup> *Id.* at 21. *But see* AM. BAR ASS’N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003); *reprinted in* 31 HOFSTRA L. REV. 913, 944 (2003), <http://www.ambar.org/2003Guidelines>.

<sup>253</sup> FINAL REPORT, *supra* note 240, at 9.

<sup>254</sup> *Id.* at 7.

<sup>255</sup> *See* JOE DETERS ET AL., DISSENTING REPORT FROM MEMBERS OF THE JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO’S DEATH PENALTY 35–37 (2014), *available at* <http://www.sc.ohio.gov/Boards/deathPenalty/resources/dissentingReport.pdf>.

<sup>256</sup> FINAL REPORT, *supra* note 240, at 8. A Judicial Role Subcommittee recommendation was also passed 16-0 that provided if the ABA Guidelines and Supplementary Guidelines were adopted, it would be necessary to determine whether these are merely guides or to be applied as standards to be monitored and enforced by the trial court; in either event, the trial court shall take appropriate steps on the record to monitor and/or enforce a checklist of guidelines, and how to do so shall be addressed by the Supreme Court of Ohio and the Ohio Judicial College in the Capital Crimes Seminar. *Id.* The Ohio Supreme Court took some action on this proposal with mixed results. *See* Koosed, *supra* note 222, at 828–31.

Other recommendations provide additional, and perhaps alternative, means of enhancing defense services in Ohio.<sup>257</sup> As expected, costs and resources entered into many of the discussions of the Joint Task Force.<sup>258</sup>

In 2015, after reflecting on the defense services recommendations, this author wrote:

The lessons of experience in Ohio suggest that two equally powerful motivators for change are at work here: saving resources by avoiding costly retrials, and avoiding conviction of the innocent and/or execution of the undeserving. It remains to be seen whether the measures recommended to the Joint Task Force will come to fruition. The voices of present and former judges, legislators, and of our former attorney general will likely be the most powerful in this endeavor. But, other stakeholders need to be brought into the fold, as well. I hope for the best—if not abolition, some needed improvements in a still rather broken system.<sup>259</sup>

By 2015, three recommendations had been acted on. Several legislators were working on bills attending to another fourteen of the fifty-six recommendations; one state senator described these as “serious objections” to the present capital litigation system.<sup>260</sup> These include recommendations foreclosing execution of the severely mentally disabled (Recommendation 8), foreclosing convictions based solely on

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<sup>257</sup> In addition to recommending the adoption of the 2003 ABA Guidelines, and the Supplementary Guidelines, the Joint Task Force responded to the Assessment Team’s concern regarding “Inadequate Qualification Standards for Defense Counsel” by recommending Ohio do the following (many of which fall within the umbrella of the ABA Guidelines, but were earlier specific recommendations): expand and enhance training requirements to all participating legal counsel (appointed and retained) and to all Ohio judges at all levels, which could be waived in exceptional circumstances with the consent of the Ohio Supreme Court if their qualifications otherwise exceed the standards required by Rule 65; and amend Rule 20 to: increase (double) CLE hours for defense counsel, and require within this a minimum two hours CLE each on forensics, mental health, and mitigation every two years; monitor appointed counsel on a monthly basis; investigate and maintain records concerning whether counsel seeking (re-)certification have been found ineffective and take appropriate corrective action; adopt qualifications for post-conviction counsel that include three years of civil or criminal or criminal appellate experience (unless employed by an institutional office where there is supervision by qualified counsel); and specialized training as set out above. FINAL REPORT, *supra* note 240, at 12, 21, 45, 47, 49. For an update on some of these issues, some helpful and others somewhat regressive, see Koosed, *supra* note 222, at 828–31.

<sup>258</sup> Though the Joint Task Force did not discuss whether death sentencing systems were costlier than life imprisonment without parole and should be discontinued because of cost, as this was deemed to be beyond the scope of the Joint Task Force, such discussion has occurred outside of the Joint Task Force. See, e.g., Lynd, *supra* note 209, at 40–41.

<sup>259</sup> Koosed, *supra* note 222, at 824.

<sup>260</sup> Alan Johnson & Mike Wagner, *Questions Raised About the Death Penalty in Ohio*, COLUMBUS DISPATCH (Mar. 8, 2015), <http://www.dispatch.com/content/stories/local/2015/03/08/death-or-life.html> (quoting Joint Task Force member and Republican Senator Bill Seitz).

uncorroborated jailhouse snitch testimony (Recommendation 18), establishing a statewide death penalty fund in the OPD Office (Recommendations 13–15, in some respects), and certification of crime labs and coroner’s offices (Recommendations 2–4, in some respects).<sup>261</sup> To enhance the likelihood of legislative and judicial action adopting the Joint Task Force’s recommendations, public education about the recommendations was ongoing through advocacy groups,<sup>262</sup> talks presented by Joint Task Force members, and news articles and opinion pieces.<sup>263</sup>

### *B. Eliminating Racial and Geographic Disparities, Arbitrary and Discriminatory Sentencing*

Although the Joint Task Force acknowledged that racial and geographic disparities in sentencing had been shown in earlier reports,<sup>264</sup> disappointingly, it declined to recommend that a full race study be conducted.

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<sup>261</sup> *Id.*; see generally FINAL REPORT, *supra* note 240.

<sup>262</sup> See, *Task Force Recommendations*, OHIOANS TO STOP EXECUTIONS, <http://otse.org/56-recommendations/> (last visited Apr. 18, 2019) (summary of the Joint Task Force 2013–2014 Report and its recommendations).

<sup>263</sup> The OTSE website used to contain several videos of talks given by Joint Task Force Members, such as Common Pleas Court Judges Michael Donnelly and John Russo and Chair retired Court of Appeals Judge James Brogan.

In 2014, State Public Defender and Task Force member Tim Young participated in a panel discussion with (now-deceased) Terry Collins, a former director of the Ohio Department of Rehabilitation and Corrections, who oversaw the execution of thirty-three Ohio inmates and came to oppose the death penalty. See Margery M. Koosed, *Trying to Get It Right—Ohio, from the Eighties to the Teens*, 43 HOFSTRA L. REV. 783, 827 (2015) (discussing a news article written by Gary Hufferberger for the Wilmington News Journal on October 2, 2014, and titled: *Fairness of Death Penalty Challenged, Panelists Urge Changes to Way Capital Punishment Is Applied*).

Witnesses before the Joint Task Force have also made presentations to church groups, and/or written opinion pieces. See, e.g., Petro & Fisher, *supra* note 247. See generally Johnson & Wagner, *supra* note 260.

Public Defender Tim Young responded to the change in lethal injection drugs and the new secrecy law, stating: “Ohio needs to take a comprehensive look at its death penalty system and execution process . . . . Rather than continuing to patch and trying to hide a flawed, decades-old system, it’s time for Ohio to carefully examine the costs, benefits, structure and practices of capital punishment.” Robert Hines, *Ohio Alters Lethal Injection Protocol, Delaying Execution*, CLEV. PLAIN DEALER, Jan. 9, 2015, at A3.

<sup>264</sup> Ohio’s death row is over 50 percent African-American, though they are just 12 percent of the population. But this is not merely a question of defendants’ race, it is also about ‘do black lives matter?’ Nationally, in interracial murders, the figures for those executed show a 14:1 disparity—twenty white persons have been executed for killing a black person, while 290 black persons have been executed for killing a white person. *Death Penalty Fact Sheet*, *supra* note 1. The 2007 ABA Ohio Death Penalty Task Force had reported that those who kill whites are 3.8 times more likely to receive a death sentence than those who kill blacks. *Evaluating Fairness*, *supra* note 193, at 355–57. It had also referenced the 2005 Associated Press study which reported that while 8 percent of people charged with a capital crime were sentenced to death in Cuyahoga County, 43 percent of those charged in Hamilton County received a death sentence. *Id.* at 355–56.

In the absence of a Task-Force-recommended race study, insights can be found in a 2016 study conducted by Political Science Professor Frank Baumgartner from the University of North Carolina at Chapel-Hill.<sup>265</sup> Professor Baumgartner's examination of Ohio's, at the time, fifty-three executions led him to conclude: "Ohio's modern experience with the death penalty shows clearly that it is geographically arbitrary and that the race and gender of the victim of the crime are associated with dramatic disparities in the likelihood of execution for the offender."<sup>266</sup> Ohio is six times more likely to execute a prisoner who has killed a white female than if the victim was a black male.<sup>267</sup> Although forty-three percent of Ohio murder victims are white, sixty-five percent of Ohio executions involved white victims.<sup>268</sup> Further, more than half the executions came from four counties.<sup>269</sup>

This study confirms the importance of those recommendations the joint task force did make with respect to racial and geographic disparities. The Joint Task Force recommended:

1. Enacting legislation to require, prospectively, meaningful proportionality review to include cases where death was sought in the charges but not imposed;<sup>270</sup>

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<sup>265</sup> Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions* (Jan. 2, 2016), <http://fbaum.unc.edu/articles/Baumgartner-OhioExecutions-2016.pdf>; see also Frank R. Baumgartner, Amanda J. Grigg & Alisa Mastro, *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1977–2013*, 3 POL., GROUPS, IDENTITIES (2015) (for a more complete analysis).

<sup>266</sup> Baumgartner, *supra* note 265, at 10.

<sup>267</sup> *Id.* at 1.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> FINAL REPORT, *supra* note 240, at 4–5. As the commentary relates, despite relying on proportionality review to assure against aberrant or discriminatory death-sentencing when upholding the new law in the first Ohio Supreme Court decision regarding it, the Court claimed that "the system . . . enables the court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to all capital sentencing indictment and concluding with the sentence imposed on the defendant" (State v. Jenkins, 473 N.E.2d 264, 279 (Ohio 1986)) and that "since 1987, the Court has deemed death sentence cases the only cases relevant to the proportionality review (State v. Stumpf, 32 Ohio St. 3d 95, 108 (1987)).

For a more detailed discussion of the importance of proportionality review to identify aberrant death sentences, and how inadequate proportionality review brings about arbitrary sentencing and places undue pressure on the governor for commutation, see Margery B. Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio Death Sentences*, 19 CAP. U. L. REV. 695, 712–17, 752–74, 793–800 (1990) (note: early on under the new law, the author met with then Chief Justice Anthony Celebrezze to encourage and facilitate the use of a National Center for State Courts data collection plan for a thorough proportionality review, and it appeared the Court would adopt this. But his successor as Chief unfortunately put this aside).

No action has been taken on this Joint Task Force recommendation as yet. It is a critical reform going forward, but it is unfortunate that the Joint Task Force refused to make it retroactive. The pressure remains on the governor to fill in this 38-year gap in the law.



2. Collecting data on all death-eligible homicides;<sup>271</sup>
3. Amending legislation to include not only reporting of ‘life opinions’ to the Ohio Supreme Court, but also the prosecutor’s rationale for proposed plea agreements for any indicted capital offense that results in a plea for a penalty less than death;<sup>272</sup>
4. Training for prosecutors, judges, and police on how to protect against race discrimination;<sup>273</sup>
5. Reporting possibly discriminatory behavior to professional disciplinary committees;<sup>274</sup>
6. Recusal of judges if possible discrimination;<sup>275</sup>
7. Adoption of a Racial Justice Act to address disparities;<sup>276</sup>
8. Removing the felony-murder specifications as data shows death is rarely imposed and such will reduce the race (and geographic) disparity of the death penalty;<sup>277</sup>
9. Addressing cross jurisdictional racial discrepancy by creating a Death Penalty Charging Committee at the Attorney General’s Office to approve or disapprove charges;<sup>278</sup> and
10. Expanding the jury pool to include those with driver’s licenses in all counties.<sup>279</sup>

To the author’s knowledge, very little, if any, action has been taken respecting these measures. Nonetheless, there has been vocal support for removing the felony-murder specifications to reduce disparities, as discussed below.

### C. *Recommendations to Avert Execution of Innocents*

Researcher, author, and University of Colorado at Boulder Professor Michael Radelet<sup>280</sup> stated at a Cleveland conference several years ago: “We are making God-like decisions without God-like skills.” Indeed, we are making mistakes. Nationally,

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<sup>271</sup> FINAL REPORT, *supra* note 240, at 4–5.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 13.

<sup>274</sup> *Id.* at 14.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 15.

<sup>277</sup> *Id.* at 14.

<sup>278</sup> *Id.* at 11.

<sup>279</sup> *Id.* at 15.

<sup>280</sup> See generally RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (Northeastern University Press 1992).

164 death-sentenced inmates have been exonerated, nine of those in Ohio.<sup>281</sup> The Ohio exonerees alone were wrongfully imprisoned for a cumulative 190 years.<sup>282</sup> On a national level, exonerees average over ten years in prison before they are exonerated, whereas in Ohio, the average is twenty-one years—statistics that instruct us to be wary of those who may urge speeding up executions.<sup>283</sup> The Joint Task Force directed many of its recommendations at diminishing the risk of wrongful execution.

Some recommendations involved requiring more reliable evidence to assure against mistakes. The most expansive of these is nearly identical to a 2009 Maryland statute, enacted before Maryland abolished the death penalty.<sup>284</sup> If enacted, Recommendation 8 would provide that death can only be imposed if the state presented one of the following: biological or DNA evidence that links the defendant to the act of murder; a videotaped voluntary interrogation and confession of murder by the defendant; a video recording that conclusively links the defendant to the murder; or other evidence specified as similarly compelling by the legislature.<sup>285</sup>

Though a measure to preclude the death sentence when a conviction rested solely on eyewitness identification testimony failed by one vote, the Joint Task Force did recommend:

1. Barring a death sentence where the state relies solely on informant testimony;<sup>286</sup>
2. Requiring the prosecutor to present to the grand jury available exculpatory evidence of which the prosecutor is aware;<sup>287</sup>
3. That any in-custody interrogation be electronically recorded, and if any such interrogation is not recorded, any statement will be presumed involuntary;<sup>288</sup>
4. That all crime labs in Ohio be certified by a recognized agency defined by the legislature;<sup>289</sup>
5. That in a death-eligible case, excepting fingerprint evidence, if evidence is not originally reviewed by an accredited lab, that the

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<sup>281</sup> *Death Penalty Fact Sheet*, *supra* note 1.

<sup>282</sup> *Innocence & Wrongful Convictions*, OHIOANS TO STOP EXECUTIONS, <http://otse.org/issues/innocence-wrongful-convictions/> (last visited Apr. 18, 2019).

<sup>283</sup> *Id.*

<sup>284</sup> *See, Maryland*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/maryland-1> (last visited Apr. 16, 2019).

<sup>285</sup> FINAL REPORT, *supra* note 240, at 10

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 16.

<sup>288</sup> *Id.* at 3.

<sup>289</sup> *Id.* at 4.

defense will have a right to testing in an accredited lab at state expense, and that no reference be made to the first test;<sup>290</sup>

6. That if testing of evidence will likely entail total consumption or destruction of evidence, the test be performed in an accredited lab, and if after indictment, with notice to all parties. If this requirement is not followed, the evidence is presumptively inadmissible;<sup>291</sup>
7. And requiring that each coroner's office become accredited or have at least one person on staff or under contract who is a fellow of that organization, or in the alternative, that the coroner's office have a contract with an accredited crime lab to perform specialized services when the need arises.<sup>292</sup>

Additional Joint Task Force recommendations dealt with assuring access to exculpatory evidence in the hands of prosecutors or law enforcement agencies. Such recommendations included: enacting a court rule that mandates full and complete access in capital cases to evidence known to exist, or which with due diligence could be found to exist, with an opportunity to test such evidence; mandatory training on such issues; and mandatory declaration of compliance with all discovery obligations.<sup>293</sup>

Other provisions sought to improve and update jury instructions to assure greater comprehension and consistency in decision-making.<sup>294</sup> Further recommendations sought to assure meaningful post-conviction and clemency proceedings that could effectively identify wrongful convictions or sentences, and could avert wrongful executions of those innocent or undeserving of death because they are not the worst of the worst offenders.<sup>295</sup> The post-conviction proceeding recommendations (regarding extending the filing deadline, removing page limitations, providing that a copy of the trial record be maintained at the county court level, requiring a trial judge to make specific findings, and allowing for taking of depositions and issuing subpoenas) were adopted by the legislature.<sup>296</sup> Although

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<sup>290</sup> *Id.* at 3.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 15–16.

<sup>294</sup> FINAL REPORT, *supra* note 240, at 19–20 (recommendation 46 called for requiring that a judge prepare and provide written jury instructions in capital cases). This was enacted in OHIO REV. CODE ANN. § 2945.10(E) (West 2019) (effective Mar. 23, 2015).

<sup>295</sup> FINAL REPORT, *supra* note 240, at 12–13, 17.

<sup>296</sup> S.B. 139, 131st Gen. Assemb., (Ohio 2017) (amending OHIO REV. CODE ANN. §§ 2929.03, 2953.21, 2953.23).

action on clemency remains to be done, during his time in office Governor Kasich did issue more commutations than his modern-era predecessors.<sup>297</sup>

*D. Excluding the Severely Mentally Ill from Death Sentencing*

Recommendations 8 and 9 focused enacting legislation to consider and exclude from eligibility for the death penalty defendants who suffer from “serious mental illness,” as defined by the legislature at the time of the crime and/or at the time of execution.<sup>298</sup> This responded to the ABA Report which found that a significant number of people with severe mental disabilities had been executed and/or were currently on Ohio’s death row, some of whom were disabled at the time of the offense and others who had become seriously ill following conviction and sentencing.<sup>299</sup>

Recommendation 8, to exclude from death eligibility those who were suffering from serious mental illness at the time of their crime, has widespread support from former officials, mental health organizations, law professors, and others around the state (it appears the only opposition is the Ohio Prosecuting Attorneys Association).<sup>300</sup> The measure has been addressed in proposed legislation over the last two terms. As of July of 2019, H.B. 136 has passed the Ohio House by a vote of 76-17<sup>301</sup> and is presently pending in the Senate as S.B. 54.<sup>302</sup>

An Open Letter to the legislature in support of earlier bills H.B. 81 and S.B. 40 was signed by over sixty Ohio law professors teaching in the areas of criminal law and procedure, constitutional law, and mental health law. The author of this article was the principal drafter. The Updated Letter reads in part:

Those who commit violent crimes while in the grip of a psychotic delusion, hallucination, or other disabling psychological condition lack the judgment, understanding, or self-control to be labeled the worst of the worst or deserving of death. Their culpability is inherently so limited that while they may be convicted of capital murder, they are as a group undeserving of the death penalty.

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<sup>297</sup> Andrew Welsh-Huggins, *Kasich Spares Record Number of Death Row Inmates*, CINCINNATI ENQUIRER (July 30, 2018), <https://www.cincinnati.com/story/news/politics/2018/07/30/ohio-governor-john-kasich-spares-record-number-death-row-inmates/863740002/>.

<sup>298</sup> FINAL REPORT, *supra* note 240, at 6.

<sup>299</sup> *Evaluating Fairness*, *supra* note 193, at v, vii.

<sup>300</sup> For information and identification of supporters, see *Partners*, OHIO ALLIANCE FOR THE MENTAL ILLNESS EXEMPTION, <https://perma.cc/LA23-RG9B> (last visited Apr. 11, 2019).

<sup>301</sup> Karen Kasler, *Ohio House Passes Ban On Execution Of Inmates With Severe Mental Illness*, WOSU RADIO (June 7, 2019), <https://radio.wosu.org/post/ohio-house-passes-ban-execution-inmates-severe-mental-illness#stream/0>

<sup>302</sup> See S.B. 54, 133rd Gen. Assemb. (Ohio 2019) (available at <https://perma.cc/YL5Q-74XB>).

Senate Bill 54 exempts capital defendants from death if at the time of the crime they had a serious mental illness that significantly impaired their capacity to exercise rational judgments in relation to their conduct, to conform their conduct to the requirements of the law, or to appreciate the nature, consequences or wrongfulness of their conduct. This is akin to the Model Penal Code Section 4.01 test for insanity, but instead of acquitting a defendant of guilt, the proposed bill would simply assure that while convicted, the severely mentally ill defendant will not be executed.

Diverse Task Force members, Ohio Supreme Court Justice Paul Pfeiffer, former Ohio Supreme Court Justices Wright, Lundberg-Stratton, and Chief Justice Moyer, former Attorney General Jim Petro, former Governor Bob Taft, several Courts of Appeals judges, the American Bar Association, the National Association on Mental Illness, and countless others have concluded the death penalty is not the appropriate penalty for these individuals, and certainly not the answer to the problem of violence committed by persons with severe mental disorders. Like juveniles and those with mental disabilities, these persons lack the culpability to be sentenced to death.

Persons with severe mental illness have been and will continue to be sentenced to death and executed unless this exemption is granted. The severely mentally ill often cannot meet Ohio's highly demanding M'Naghten-type standard for acquittal by reason of insanity, *see* O.R.C. 2901.01 (14), and because of this are unable to present expert testimony in the trial phase regarding their impairment and are convicted of capital murder. *See State v. Wilcox*, 70 Ohio St. 2d 182 (1980). Once convicted, their mental illness is to be considered in mitigation, *see* O.R.C. 2929.04(B)(3) and (7), but as often as not is treated as aggravating, a reason to impose death, instead of a grounds for mercy, as respect for human dignity, understanding of moral culpability, and judicial integrity requires.

Senate Bill 54 devises fair procedures for reliably determining whether the severely mentally ill exemption applies in an individual case, procedures that are consistent with our existing ones for determining age and mental disability. There is ample opportunity for investigation and evaluation for both the prosecution and defense. The trial judge will make this decision prior to trial, and if the defendant is found ineligible for death, the state will be saved the vast resources otherwise expended in trying a capital case.

The fairness, reliability, and integrity of Ohio's criminal justice system demand that individuals with severe mental illness at the time of their crime be spared the ultimate sanction. Even the very narrow 1974 Ohio death penalty legislation exempted those with serious mental illness

from death-sentencing.<sup>303</sup> Senate Bill 54 simply re-establishes the legislative intent to forbid execution of those with such impairments.

Like former Governor Bob Taft, “I implore the legislature to look closely at two [recommendations] in particular: executing individuals with severe mental illness and applying the death penalty too broadly in felony murder cases.”<sup>304</sup>

#### E. *Eliminating the Felony Murder Specification*

Through statutory amendment and Ohio Supreme Court decisions, the concept of felony murder had been vastly expanded. Recommendation 33 was to remove the felony murder specifications as data shows death is rarely imposed and such will reduce the racial and geographic disparity of the death penalty.<sup>305</sup> In full, it reads:

Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary.<sup>306</sup>

The earlier OSBA Study had identified several Ohio Supreme Court decisions that significantly, and inexplicably, expanded the felony capital murder provisions.<sup>307</sup> It is a toxic mix when these are combined with varying aspects of inadequate appellate review of Ohio death sentences, including inadequacies affecting the reliability of the conviction, and inadequacies affecting the reliability, fairness, and non-arbitrariness in imposition of death sentences.<sup>308</sup>

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<sup>303</sup> The 1974 legislation precluded death if “the offense was primarily the product of the offender’s psychosis or mental deficiency.” *Lockett v. Ohio*, 438 U.S. 586, 593–94 (1978) (referencing then O.R.C. §§ 2929.03–2929.04).

<sup>304</sup> Taft, *supra* note 247.

<sup>305</sup> FINAL REPORT, *supra* note 240, at 14.

<sup>306</sup> *Id.*

<sup>307</sup> Shank, *supra* note 171, at 383–92.

<sup>308</sup> *Id.* See also Margery M. Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio Death Sentences*, 19 CAP. U. L. REV. 695, 699–722 (1990); WELSH-HUGGINS, *supra* note 11, at 110.

As former Governor Bob Taft, who voted for the death penalty law while a legislator and oversaw 24 executions as governor,<sup>309</sup> urged:

It is now time to act on this [severe mental illness] bill. . . . The legislature also should act to remove the death penalty as a possible sentence for felony murders . . . . We know much more about the death-penalty system than we ever could have imagined when legislators brought the law back in 1981, and we should use this knowledge to inform the necessary changes to our laws.<sup>310</sup>

*F. Using the Knowledge We Have Acquired to Re-Assess the Death Penalty*

With no demonstration that the death penalty deters,<sup>311</sup> we are left with retribution as its rationale. Our enhanced knowledge through restorative justice policies and programs suggests the death penalty is not what will best support victims' families in their time of loss or years later.<sup>312</sup> We may soon have more data to establish that. Though no race study was recommended, the Joint Task Force did recommend creating a study commission to study how best to support the families of murder victims, and this was enacted, effective March 23, 2015.<sup>313</sup>

Our knowledge refutes continuing with this most ignoble experiment. Our most ancient principles of self-defense for individuals and nations tell us not to kill in the absence of absolute necessity, a compelling governmental interest. As Pope Francis recently recognized, there is no absolute necessity justifying the death

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<sup>309</sup> WELSH-HUGGINS, *supra* note 11, at 110. See Pfeifer, *supra* note 227. Former Chief Justice Paul Pfeifer, former Attorneys General Jim Petro and Lee Fisher were in the legislature in 1981 and all urge reforms. See Petro & Fisher, *supra* note 247.

<sup>310</sup> Taft, *supra* note 247.

<sup>311</sup> See, *DETERRENCE*, *supra* note 60.

<sup>312</sup> See generally, *Victim Resources*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/victim-resources> (last visited Apr. 16, 2019).

<sup>313</sup> FINAL REPORT, *supra* note 286, at 12. Recommendation 19 passed unanimously. It was anticipated that testimony would be presented, and a study would be funded, during which groups such as Murder Victim's Families for Reconciliation would have a role. But see, *Homicide Survivors Ignored in Study of Victims' Needs*, OHIOANS TO STOP EXECUTIONS, <http://otse.org/homicide-survivors-ignored-study-victims-needs/> (last visited Apr. 15, 2019) [hereinafter *Victims' Needs*]. Though elected prosecutors in Ohio and other states would have voters believe that all victim's families are firmly committed to executing the offender, and that in supporting the death penalty the prosecutor is just doing what families need or want, this is not the case. See, e.g., WELSH-HUGGINS, *supra* note 11, at 89 (relating a family's desire to be spared the long term pain of the death penalty process and concern that seeking death may tear the grieving family apart). As several victim's families have related to this author, taking another's life does not honor the life that they have lost. See also, *Victim's Needs*, *supra*.

penalty, in any type of case.<sup>314</sup> Life imprisonment suffices, and also permits correction if a mistaken conviction occurs.

Moral arguments, along with practical concerns about the fiscal costs of this penalty and its dwindling application, must be considered. Looking at the cost of the death penalty in comparison to life imprisonment was not within the Joint Task Force's charge, and it was not addressed. But any discussion of late does consider relative costs. Many studies have been conducted nationally and demonstrate that death penalty cases cost far more than ones where life imprisonment is sought.<sup>315</sup> The Dayton Daily News reported in 2014 that Ohio death cases cost taxpayers over three million dollars, while life sentences only cost one million.<sup>316</sup> In 2018, the Cleveland Plain Dealer reported the estimated costs for arrest through execution in Ohio at two to three million dollars (with just the investigation leading to the arrests costing \$600,000); compare that to \$1.4 million for an inmate from the time of arrest to a natural death after 50 years of imprisonment.<sup>317</sup>

When the death penalty does not deter, expending such funds is simply wasteful—better to be smarter on crime and implement more effective ways to reduce crime.<sup>318</sup> That understanding is leading Republican legislators in at least six states to introduce bills to repeal the death penalty: “in solidly red states, GOP-controlled legislatures are debating whether capital punishment is fiscally sensible and just.”<sup>319</sup> Ohio is not yet one of those states, but the same concerns call for an active response and full-fledged attention at the Statehouse.

### CONCLUSION

We know much more now than legislators did during the serious abolition debates over the last two centuries. It is time to try again to abolish, or at the very least, enact the reforms that the state bar, national bar, and Joint Task Force have recommended. The time is right, and perhaps, so are the players, conservative and liberal legislators alike. A Cleveland columnist recently wrote that given Governor

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<sup>314</sup> Elisabetta Povoledo & Laurie Goodstein, *Pope Francis Declares Death Penalty Unacceptable in All Cases*, N.Y. TIMES (Aug. 2, 2018), <https://perma.cc/RCM5-N57C>.

<sup>315</sup> See generally, *Death Penalty Fact Sheet*, *supra* note 1.

<sup>316</sup> *Execution Costs Rise*, DAYTON DAILY NEWS (Feb. 22, 2014), <https://www.daytondailynews.com/news/crime--law/execution-costs-rising/c1UWGYDUls1ze8Cngno5yK/>.

<sup>317</sup> John Caniglia, *The High Cost of Death Penalty Cases—As With Rhoden Killings, State Has to Step in When Counties Can't Afford to Pay*, CLEV. PLAIN DEALER, Dec. 30, 2018, at B-1, B-3.

<sup>318</sup> See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS (2009), <https://files.deathpenaltyinfo.org/documents/pdf/CostsRptFinal.f1560295688.pdf>.

<sup>319</sup> Dan Frosch, *Republicans Leading New Charge to End the Death Penalty*, WALL STREET J. (Feb. 19, 2019), [https://www.wsj.com/articles/republicans-leading-new-charge-to-end-the-death-penalty-11550572205?mod=hp\\_lead\\_pos8](https://www.wsj.com/articles/republicans-leading-new-charge-to-end-the-death-penalty-11550572205?mod=hp_lead_pos8).



Mike DeWine’s “range of public service . . . and age, being governor could be [his] last elected office” and that were DeWine to take up the abolition cause, his “moral leadership in helping end Ohio’s death penalty would be a lasting legacy.”<sup>320</sup>

Perhaps the abolition stars will yet align in Ohio, and one hopes, soon.\*\*

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<sup>320</sup> Governor DeWine previously served as a county prosecutor, state senator, lieutenant governor, U.S. Senator, and attorney general. He is 72. See Thomas Suddes, *Gov. Mike DeWine is plain spoken about gas tax, has death penalty on the agenda*, CLEVELAND.COM (Feb. 22, 2019), <https://www.cleveland.com/opinion/2019/02/gov-mike-dewine-is-plain-spoken-about-gas-tax-less-forthcoming-on-death-penalty-thomas-suddes.html>.

\*\* Addendum. Since the drafting of this article, the United States Court of Appeals for the Sixth Circuit has, in a very short opinion and without oral argument, upheld Judge Merz’s denial of Warren K. Hennessy’s requests to stay his execution and enjoin the State of Ohio from executing him. *In re Ohio Execution Protocol Litigation*, No. 19-3064 (6th Cir. 2019). It is expected that Hennessy’s counsel will seek further review. A few weeks later, Governor Mike DeWine granted a reprieve to the next inmate scheduled for execution, citing a pending certified disciplinary complaint against inmate Cleveland Jackson’s former counsel. Jeremy Petzer, *DeWine Postpones Ohio Murderer’s Execution Date Again*, CLEV. PLAIN DEALER, Oct. 2, 2019, at A3.

